CASES

DECIDED IN THE

COURT OF SESSION,

DURING

SUMMER SESSION 1794,—*WINTER SESSION* 1794-5,—
AND SUMMER SESSION 1795.

COLLECTED BY APPOINTMENT OF THE

SOCIETY OF CLERKS TO THE SIGNET.

EDINBURGH:

1796.

Entered in Stationers Hall in terms of Law.

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2. The huſband conveying on his death all to the wife, and the wife on her death all to the huſband, his heirs and aſſignees, the wife is not by this clauſe, in the event of her ſurviving her huſband, deprived of the power of diſpoſal of her effects.
3. The heritable property belonging to the wife being conveyed to the huſband in the contract of marriage, and he afterwards giving a reconveyance to the wife of certain ſubjects which were ſold by mutual conſent, the heirs of the huſband were found not to be liable for the price to the diſponee of the wife.

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SUMMER-SESSION 1795.

May 13. 1795. Judges Preſent,

Lord PRESIDENT,

Lord JUSTICE-CLERK, Lord ESKGROVE, Lord SWINTON, | Lord DREGHORN, Lord POLKEMMET, Lord STONEFIELD, | Lord CRAIG, Lord METHVEN.

N° LVII. ROBERT MACGHIE, Eſq; and Attorney, Purſuers,

AGAINST

The Truſtees of the deceaſed Mrs JEAN FORBES.

THE queſtions decided by the Court in this cauſe were, Whether a creditor's intromiſſions with the rents of the debtor's property interrupts preſcription? and, Whether the bona fide poſſeſſion of rents under a colourable title, ſecures the poſſeſſor from repetition of what has been received and conſumed? The circumſtances of the caſe are theſe:

James Macghie merchant in Edinburgh was proprietor of houſes in that city. In his ſon William's contract of marriage, he bound himſelf to pay to his ſon, his heirs, executors, or aſſignees, 9000 merks Scots; 3000 thereof at Whitſunday 1735, and the remaining 6000 merks at the firſt term after his death. James Macghie, the father, died in September 1742; and William entered into the poſſeſſion of the houſes, and continued to draw their rents during his lifetime, the amount of which yearly was not above L. 20 Sterling.

This firſt marriage of William, the ſon, was diſſolved by the death of the wife; and he married Mrs Jean Forbes, and became bound, by a poſtnuptial contract in the 1751, to ſettle her in an annuity of L. 30 Sterling; but no ſecurity was given her till the 1771, when William aſſigned to her the obligation by his father for the 9000 merks contained in his former contract of marriage, in ſecurity of her annuity of L. 30; "and in further ſecurity, he "aſſigned and diſponed to her the rents, maills, and duties of the houſes, &c. "all belonging to his ſaid father, and the rents uplifted by him, in ſatisfaction "of the foreſaid ſums, with power to her to uplift the ſame to the extent of her "jointure, in the ſame manner he was in uſe to uplift the ſame himſelf."

William died in the 1772; and his widow Mrs Jean Forbes upon his death continued his poſſeſſion of the ſaid ſubjects, which were inadequate to her jointure, though they were the only ſubjects from which ſhe could receive any thing; and theſe rents ſhe uplifted down to her death in the 1781.

During all this time neither William nor his widow had met with the ſmalleſt interruption; and ſhe having made a ſettlement, diſtributing what ſhe ſhould die poſſeſſed of, her truſtees, after her death, recovered her funds, and divided them, in terms of her deſtination, without having any demand made upon them by the purſuer. At laſt, in the 1792, an action was raiſed by Robert Macghie, the ſon of William's elder brother, and of courſe the heir of James Macghie, againſt the truſtees of Mrs Jean Forbes, in order to force them to account for her intromiſſions, as well as for the intromiſſions of her huſband, with the rents of the ſaid ſubjects; and it was in the courſe of this action that the queſtion occurred, Whether, as William Macghie had raiſed no action on the obligation in the 1735, his intromiſſion with his father the debtor's ſubjects was ſufficient to interrupt the preſcription? and the other queſtion, Whether, as Mrs Forbes, the widow, had drawn the rents, in bona fide payments of her jointure, and upon her huſband's aſſignation, her truſtees could be made liable for what ſhe had ſo drawn? Informations having been ordered, the cauſe was this day adviſed.

OPINIONS.

B.—It is certainly true, that William had no title to enter into poſſeſſion of the ſubjects; but there is real evidence that he did enter into poſſeſſion, and that he continued in poſſeſſion, he and his wife, for forty years; and the rents muſt be imputed in ſolutum of the debt; in payment of the intereſt in the firſt place, and then of the principal. He may not have had a right by which he could have forced himſelf into poſſeſſion; but having obtained poſſeſſion, and continued in it, I can never conſider him as a predonious poſſeſſor. Preſcription has not run in this caſe; for any payment of intereſt or principal puts an end to the plea of preſcription; and it is the ſame thing, whether the creditor receives a partial payment, or recovers effects of his debtor. I hold the rents received in this caſe as a payment pro tanto; that William the creditor can ſay, at any diſtance of time, "this is a payment to account of my claim;" and that he would give a very ſufficient account in ſaying, I am ready to allow theſe rents which I have received to go in part of my debt. But the wife is in a different ſituation: The huſband entered without any title, the wife did not; for her huſband aſſigned to her the debt of 9000 merks, as well as the rents of the ſubjects, and ſhe enters upon the poſſeſſion, and receives the rents under that aſſignation, down to the time of her death. Now, although her title be granted a non domino, yet ſhe uplifts the rents under a title, in payment of her arrears of jointure, and they are bona fide percepti et conſumpti, conſequently ſhe could not have been liable; and if ſo, ſtill leſs can her truſtees be liable, who have long ago paid away her funds: I am therefore clear that the truſtees muſt be aſſoilzied.

A.—No doubt, William might have been removed, as he poſſeſſed under no title. But he muſt have entered originally upon an agreement amongſt the parties: or even had he been acting in the abſence of the heir, as factor, or negotiorum geſtor, he did right in applying the rents in payment of his own debt; he was entitled to do it, as there was no interpellation, and it was for the advantage of all parties.

The

The judgement of the Court was, ſuſtain the defence, aſſoilzie from the action, and decern; and find the defenders intitled to their expences.

And a reclaiming petition being preſented for the purſuer, it was refuſed 2d June 1795, leaving entire all queſtions of ſuperintromiſſion.

For the Purſuer, Geo. Fergusſon, } Adv. Ed. Bruce, W. S. } Agents.
Defenders, Alex. Elphinſtone, } Adv. Ant. Barclay, W. S. } Agents.

Lord Eſkgrove Ordinary. Pringle Clerk.

N° LVIII. THOMAS WHITSON of Parkhill, Purſuer,

AGAINST

JOHN DUNCAN in Rattray.

IN a leaſe entered into betwixt the parties, which was to endure for 19 years, there was the following clauſe: "Providing always, That in caſe Mr Alexander Whitſon, the proprietor's eldeſt ſon, ſhall incline to take the ſaid lands and houſes into his own poſſeſſion, at the expiration of eleven years from the foreſaid term of entry, then, upon a premonition of ſix months, this leaſe is to ceaſe and determine at that period; but unleſs ſuch premonition is duly made, and the ſaid Alexander Whitſon ſhall himſelf enter to and poſſeſs the premiſſes at that time, it ſhall not afterwards be in his power to demand or aſſume poſſeſſion of the ſame during the currency of the leaſe."

The queſtion which aroſe upon the clauſe was this: Alexander Whitſon meant to take advantage of the breach, and he gave an intimation of his intention to the tenant, as required; but being a ſurgeon in the navy, before he could enter into the poſſeſſion, he was obliged to join his ſhip, and was in actual ſervice at the time that he ſhould have taken poſſeſſion of his farm: and the queſtion therefore came to be, Whether he could manage the farm by the aſſiſtance of another directing the buſineſs, and paying out the expence on his account and riſk. The Sheriff had found, that the tenant muſt remove, upon the purſuer's giving an obligation to poſſeſs the farm by Alexander the ſon, and for his behoof, and not for behoof of any other: An advocation of this was remitted ſimpliciter; but the cauſe coming this day before the Court, upon a petition and anſwers againſt that judgement, it was reverſed.

OPINIONS.

B.—The clauſe is put in for the purpoſe of ſecuring the heir in the natural poſſeſſion of the land, if he ſhould incline to take it at the expiry of eleven years; but according to the explanation put upon it by the landlord, it is no more than a common breach; and it would have been as well to have given him a power of entering to the poſſeſſion, without annexing any condition to it. But the meaning is clearly, that the heir of the family might have the poſſeſſion, and a power of poſſeſſing his own lands, but not a power of putting a piece of money in his pocket, by ſubſetting the farm.

C.—

C.—I understand, from that clause, that the heir has no right to put in tenants, grieves, or factors, into the possession of this farm, but that he must occupy it himself.

D.—I am very clear that the son must enter into the possession himself.

The Court dismissed the action of removing; and found, that the tenant was intitled to retain his possession.

For the Pursuer, George Fergusson, Defender, Charles Hay, } Adv. William Macdonald, W. S. Jo. Adamson, } Agents.

Lord Methven Ordinary. Sinclair Clerk.

N° LIX. The Creditors of HENRY GRAHAM, late of Hourston;

AGAINST

WILLIAM GRAHAM of Hourston.

THE question at issue betwixt the parties in this cause was, Whether debts, contracted by an apparent heir in an unentailed estate, (at least in an estate where the entail was not on record), could affect the estate, after the recording and completing of the entail, the creditors, in the mean time, having taken no steps for rendering their debts a burden on the estate?

The estate of Hourston was originally acquired by Henry Graham, merchant in Stromness; and in the 1737 he entailed it on a series of heirs, the deed containing prohibitory, irritant, and resolutive clauses. The maker of the entail was succeeded by his son Charles Graham the institute, who took infeftment on the precept of seisin in the deed of entail, and held the estate under that deed down to the 1744, when he died. He was succeeded by his son Henry Graham, the next heir of entail, who entered into the natural possession of the estate, and possessed the estate down to the 1776, upon his right of apparency.

During this long period, Henry Graham contracted debts, for which he gave bonds and bills; but no step was taken by any of the creditors to attach the estate, when, in the 1773, the entail was put on record.

After the death of Henry Graham, Alexander Graham succeeded to the estate; and he expede a service, as heir of tailzie and provision to his elder brother Charles, passing by Henry, who had possessed only on his apparency. He thus carried a right to the procuratory of resignation in the original entail, which had remained unexecuted; he obtained a charter of resignation, was infeft upon it, and then granted a precept of clare constat in his own favour, to carry the property; and so completed his titles to the whole estate, passing by Henry, the heir apparent, and contractor of the debts in question.

The creditors of Henry Graham, seeing Alexander complete his titles in this way, conceived, that he had brought himself under the operation of the act 1695. c. 24. and proceeded to constitute their debts against him, and to prepare for bringing the estate to a sale. And Alexander dying, he was succeeded by his

his ſon William Graham, againſt whom, as well as againſt the whole heirs of entail, &c. the action of ranking and ſale was brought.

In the ranking, this objection was made to the debts contracted by Henry Graham, the apparent heir: "That he had no right whatever to the eſtate; "that none of the debts contracted by him, were made real or effectual upon "the eſtate, before the rights of the heirs of tailzie, as creditors, were comple- "ted and ſecured by infeftment upon the entail, and by the regiſtration "of the entail:" while by the creditors it was maintained, that the act 1695, c. 24. gave the creditors of an apparent heir three years in poſſeſſion, a right to contract with him, and rendered his debts a burden on the heir entering and paſſing him by; and if ſo, it would be extraordinary if the act 1685, which was intended for the benefit of creditors, and meant to ſtrike againſt future contractions only, ſhould, from the circumſtance of the entail being put on record after the contraction of the debts, have the effect of cutting down theſe prior contractions.

This point was ſtated in informations to the Court, and came this day to be judged of.

The Lord Juſtice-Clerk withdrew.

OPINIONS.

N.—It appears to me, that the claim of the creditors is not well founded. It is argued for the heir of entail, that, under the act 1695, the obligation does not ariſe on the death of the apparent heir, but from the next heir's having ſerved, paſſing by the apparent heir; and ſo it has been found. If ſo, it decides this cauſe; for although the next heir entered, in what character was it? not as unlimited fiar, but under an entail, which excludes the claims of creditors. He is therefore in the ſame ſituation as if he had not entered; in which caſe no claim could have been made. This opinion is fortified by the clauſe in the act of parliament, which gives a preference to the debts of the perſon entering, and of the predeceſſor, over thoſe of the apparent heir. Now, as neither the debts of the predeceſſor, nor of the perſon entering, could poſſibly have affected this eſtate, it is clear that the act of parliament does not apply to the entry of an heir in ſuch a caſe as the preſent.

D.—The words of the act are, that the heir entering ſhall be liable to the debts of the apparent heir, "in ſo far as may extend to the value of the lands "and eſtate;" now what was the value of the eſtate that was in the poſſeſſion of the apparent heir, and to which this heir entered? it was the rents of the eſtate during the lifetime of the apparent heir; and had Alexander been alive, he muſt have been liable, ſo far as he drew any rents; but he is gone, and no perſon repreſents him.

C.—Had any of the creditors taken ſteps to complete their rights before the entail was put on record, thoſe rights would have been good againſt the eſtate, and the poſterior recording of the entail would not have affected them. Then what does the act 1695 declare? In the common caſe, it makes the heir liable who paſſes by an apparent heir three years in poſſeſſion; and the object of the act is to make the heir entering perſonally liable. But what was the ſituation of this eſtate? The entail was recorded during the lifetime of Henry, the apparent heir; and Alexander, the heir, making up his title, could

not take up the eſtate in the ſame way that he might have done had there been no entail; for it came to him now under the fetters of that entail. But, ſay the creditors, no matter; Alexander has come under the enactment of the ſtatute 1695. The anſwer is, "True, he has paſſed by the apparent "heir; but he has paſſed by no man to whom he could have made up titles, "and he has carried off no eſtate that could have been applied to pay off the "debts of the deceaſed." In all the caſes that I know where an heir can be made liable under this act, the heir entering may ſell, and pay off the debts of the heir, who had lived in apparency. But here there is an entail; and the caſe does not fall under the ſpirit of the act 1695. The creditors might have prevented the entail from excluding their claims during the lifetime of Henry Graham; but having miſſed that opportunity, they have no power now of making the eſtate liable.

F.—Suppoſing an entail to be recorded, it is tantamount to making an entail; and here an entailer contracts debts, and then he puts the entail upon record, for the purpoſe of ſweeping away all the debts. Had the creditors known this, they would have made their debts effectual on the eſtate; but they are not to blame; and we ſhould not deprive the creditors of their payment, in a caſe where the entail was kept up, and not heard of, till it was brought out for the very purpoſe of cutting down debts fairly contracted.

A.—This laſt opinion refers to the debts contracted prior to the regiſtration of the entail; but I am of the opinion expreſſed by the majority of your Lordſhips. It is true, the debts were contracted prior to the recording of the entail; but they were contracted by a perſon unconnected with the eſtate; by one who drew the rents, but who had no feudal title to the eſtate. What does the act 1695 do? No doubt, had Henry, the apparent heir, entered, and had the creditors taken the proper ſteps, they might have made their debts effectual againſt the eſtate; but they have loſt that opportunity, and there is an end to that; ſo that it comes now to a queſtion of conſtruction on the act 1695. The act ſays, that the heir entering ſhall be liable for the debts and deeds of the interjected perſon: This has been conſidered as a penalty; but I do not conſider it as ſuch, it is a mere act of juſtice. To the heir, this ſtatute ſays, "You ſhall not take the "eſtate, without being liable for the debts:" he is declared liable for them, as if they had been his own, as if he had contracted them: let us ſee then, what would be the conſequence, in ſuch a caſe as this, of conſidering them in that light. Suppoſe we were to hold theſe debts to have been due by Alexander, they could not be in a better ſituation than his own debts; for the act poſtpones the debts of the apparent heir, to the debts of the heir entering, and to the debs of the predeceſſor. How could it happen then, that this entailed eſtate, againſt which Alexander could not have brought his own debts, can be made liable, through his means, for the debts of Henry, the apparent heir? It is impoſſible. I agree in the opinion, that if Alexander were ſtill alive, the rents would be attachable, firſt for his own debts, and then for the debts of the apparent heir. But that is a point which is not before us; and I am clear that the creditors have no claim on the fee of the eſtate.

E.—I am of the opinion which has been expreſſed by the majority of your Lordſhips.

The

The judgement pronounced was in theſe terms: " The Lords ſuſtain the " general objection ſtated to the whole debts contracted by Henry Graham, " the apparent heir; and remit to the Lord Ordinary," &c.

Againſt this judgement a petition was preſented by the creditors, which was refuſed without anſwers.

For the Creditors, David Williamſon, } Adv. John Young, } Agents.
Heir of Entail, W. Honyman, } Adv. A. Youngſon, W. S. } Agents.

Lord Dreghorn Ordinary. Menzies Clerk.

May 14. 1795. Judges Preſent.

Lord PRESIDENT,

Lord JUSTICE-CLERK, Eskgrove, Swinton, | Lord DREGHORN, Polkemmet, Stonefield, | Lord CRAIG, Methven.

N° LX. JAMES Earl of Fife,

AGAINST

Mrs MARTHA MACKENZIE, &c.

THE queſtions in the counter actions which depended betwixt the parties, aroſe from claims on the part of the Earl of Fife, as general diſponee of the late Mrs Udney Duff; and from counter claims at the inſtance of Mrs Mackenzie, &c. the executors of Mr Udney Duff, founded on his contract of marriage with Mrs Duff, and made againſt the Earl, as her repreſentative. The firſt queſtion was, Whether the Earl, as repreſenting Mrs Udney, had right to the debts and ſums of money due to Mr Udney at the diſſolution of the marriage, in virtue of the contract of marriage?

Theſe debts and ſums of money amounted to L. 15,000 Sterling, and were due by bonds and bills. The clauſe in the contract of marriage on which the queſtion turned was in theſe terms: " Aſſigns and diſpones to the ſaid Mrs " Margaret Duff, in caſe ſhe ſhall happen to ſurvive him, her heirs, &c. the " whole moveable goods, gear, and effects, which ſhall belong to him at the " time of his death, including heirſhip-moveables, houſehold-furniture, out- " ſight and inſight pleniſhing, ſilver-plate, jewels, and linens, and, in general, " all moveable goods and effects, of whatever kind or denomination, which " ſhall belong to him at the time of his death, and that free of all debts and " deductions whatſoever." And this clauſe had been altered in the ſcroll by Mr Udney himſelf; for he ſtruck out of it theſe words, " all debts and ſums " of money which ſhall belong to him at the time of his death."

On the part of Lord Fife it was urged, That this clauſe was to be explained by the directions given for making out the contract, where the expreſſion was " moveable effects of whatever kinds;" and that by this expreſſion was meant his whole perſonal eſtate of every denomination, is evident, from his burdening his heir (in the very ſame paragraph) with his debts; and in another part of this

this memorandum, the term "effects" is applied to property of all kinds: and in our acts of parliament, the words "goods and gear," which are uſed in this clauſe, mean nomina debitorum; and they bear the ſame meaning in the deciſions of the Court, November 1683, Oſwald againſt Mortimer, and Thomſon 1692, collected by Harcarſe; and 1ſt Dec. 1699, Henderſon againſt Bar, collected by Dalrymple.

On the other hand it was urged, That the meaning put upon the clauſe by Mr Udney appeared very clearly, from the alteration which he had made upon it; and Mrs Udney's opinion on the ſubject was no leſs clear, from her conduct for the ſix months after her huſband's death, when ſhe allowed his executors to intromit with the funds in queſtion without challenge. The diſtinction betwixt the corpora of moveables, and nomina debitorum, is perfectly underſtood; and the terms and technical language by which the one is conveyed, is never applied to the other. 19th February 1745, Kerr againſt Young, Falc. —17th November 1758, Johnſton againſt Wilſon, Fac. Col.—18th February 1737, Cunningham againſt Livingſton, C. Home.

Upon this point the following opinions were delivered:

OPINIONS.

B.—In forming my opinion, I am firſt led to conſider the clauſe in this contract; and I am convinced that it was meant to comprehend the corpora mobilia only, not the nomina debitorum. In this clauſe there is a very particular enumeration of the articles included under it; we have not the general words of goods and gear only; but we have particulars; and it is a general rule of law, that a ſweeping clauſe of this kind is not to be extended to particulars of a different nature from thoſe which have been enumerated. The words here do not extend to any thing beyond mobilia; and, conſequently, had I been left to form my opinion upon the terms of the clauſe, I muſt have thought that the want of the word "debts," ſhowed that the clauſe was not meant to extend to them. But I am much more inclined to this opinion, when I take into conſideration the other circumſtances: We ſee Mr Tytler's ſcroll altered, the very words kept out which would have carried the nomina debitorum, and this alteration made by Mr Udney. This ſhows his ſenſe of the matter; and her's is equally to be diſcovered in her conduct to Mr Udney's nieces, whom ſhe allows to carry off the effects, without even entering her claim, though ſtrongly urged to this by her man of buſineſs. Laying all theſe together, I am clear that the clauſe goes no further than to convey the corpora mobilia.

A.—There is a very ſenſible diſtinction made by Preſident Dalrymple in reporting the caſe Henderſon againſt Bar. He tells us, that the words "goods "and gear," ſometimes comprehend ſpecies of moveables only, and ſometimes likewiſe nomina debitorum, ſo that it is in a great meaſure a quæſtio voluntatis. In this caſe, I am clear, and on the ſame grounds which have been ſtated, that the clauſe does not comprehend nomina debitorum.

D.—I am clearly of the ſame opinion.

The Dean of Faculty aſked, what effect this opinion was to have on the caſh and bank-notes lying in the repoſitories, and amounting to L. 400 Sterling.

B.—There may be ſome doubt as to bank-notes, becauſe theſe conſtitute

claims

claims which may be transferred, although requiring no deed of conveyance; but money falls under corpora mobilia.

Some converſation took place upon this point; but, as it had not been diſcuſſed in the papers, it was thought unneceſſary to decide it, leaving it to be brought before the Court in a reclaiming petition.

The ſecond point related to a claim at the inſtance of Mr Udney's executors, for the whole moveable effects which belonged to Mrs Udney at the time of her death, under this clauſe. Mrs Udney "aſſigns and diſpones, to and "in favour of the ſaid Alexander Udney Duff, her huſband, his heirs and "aſſignees, the whole moveable goods, gear, and effects, which ſhall belong "to her at the time of her death, including heirſhip-moveables," &c. in the ſame terms with the former clauſe.

Upon the conſtruction of this clauſe the following Opinions were delivered:

B.—When we read this and the former clauſe, by the one of which Udney conveys to his wife the moveables he ſhould die poſſeſſed of, and ſhe again conveys to him what ſhe might die poſſeſſed of, there appears a jumble; but this vaniſhes on reflection. The import of the clauſe is clearly this: if Mrs Udney ſurvives her huſband, ſhe acquires right to his moveable effects, to his corpora mobilia; but it does not follow, that ſhe was not completely miſtreſs of theſe; all of theſe corpora mobilia ſhe might have ſold, converted into money, and lent out on bond; and had ſhe died without leaving any moveables, that clauſe would have had no effect: if, however, ſhe was poſſeſſed of corpora mobilia at the time of her death, they certainly, under this clauſe, went to his executors.

A.—This clauſe has been thrown in as a counterpart to the clauſe in favour of Mrs Duff; and it is now fixed, that that clauſe does not extend to nomina debitorum, but is confined to moveables; but this clauſe goes further; for it makes over her moveables, not to the huſband only, but to the heirs of the huſband; and it has been thought to have been intended to reach to ſuch other goods as ſhe might acquire after the diſſolution of the marriage, if ſhe ſurvived. But I rather think that it proceeded from no idea of that kind, it ſeems only to have been intended to conſtitute her huſband her executor or legatee. We have had many caſes upon the lapſing of legacies by the predeceaſe of the legatee; and in late caſes you have found, that even the addition of the word "heir" does not prevent the legacy from lapſing. Here, I think, it was meant to give a right to the heirs of the huſband, but not to put them in any better ſituation than the heirs of any other legatee; and the huſband having predeceaſed, I think the right has lapſed. But it does not reſt here: for the widow might have made a new ſettlement, to defeat theſe ſubſtitutions; and this I take to have been her meaning in the deeds which ſhe executed. It appears to me, ſo far as I can judge, that ſhe meant to give effect to her laſt deeds, and to recall the former ones.

B.—No doubt this lady was proprietor of theſe effects, and ſhe might have done with them what ſhe choſe; but this clauſe does not conſtitute a legacy; it is a ſtipulation in an onerous contract, and one which conſequently ſhe cannot alter. She may, if ſhe chuſes, give nothing by it; there is no reſtriction in the deed to prevent her from defeating the purpoſes of the clauſe. This clauſe of the contract certainly has ſome meaning; but unleſs this be it, I

cannot conceive any meaning that it can have; for if you give these effects to the husband only in the event of his surviving the wife, you give him no more than he would have had without the clause.

C.—The meaning of these two clauses I understand to have been, to put the husband and wife on an equal footing; and would it be reasonable, when we see these clauses exact counterparts of each other, with the exception of these words only, "in case she shall happen to survive him," to give a different meaning to the one clause, from what you would do to the other? I am convinced that it was the understanding of parties, that they should be on a par in this particular; and I am not for giving an advantage to Udney's executors which was not meant to be given to them; I am therefore of opinion on this point, that the clause carries nothing to the executors.

The last point arose from these circumstances. In the contract of marriage, Mrs Udney conveyed her whole heritable property to her husband, in the event of his surviving her. Within three days of this, a contract or reconveyance, on the narrative of love and favour, was made by Mr Udney in favour of his wife; but they having agreed afterwards to sell the lands of Forresterhill, they were sold, and dispositions executed in favour of the purchasers by Mr and Mrs Udney. Lord Fife, the disponee of Mrs Udney, claimed the price of these lands as a subject belonging to Mrs Udney. The executors of Mr Udney supported their right on the virtual renunciation by Mrs Udney, and the revocable nature of Mr Udney's reconveyance. The Opinions delivered on this point were these:

B.—Although this settlement by Mr Udney was within so short a space of time of the marriage-contract, yet I cannot consider it as pars ejusdem negotii. Had that been the meaning of it, why was it not referred to in the marriage-contract? But so far from this, it proceeds on a narrative of love and favour. Of course this reconveyance was a revocable deed; and when these lands were sold, and the wife agreed to join in the conveyance, at the same time that the price was made payable, not to the wife, but to the husband, there can be no possible claim at the instance of her disponee.

A.—When we see that Mrs Udney, during her lifetime, would not make any claim upon the representatives of Mr Udney, I think there is no person now who can have any right to make the claim. But had it not been for this circumstance, I should have differed from the opinion which has been given, as I cannot agree in the principles upon which it is founded.

The Court found, That the conveyances in the contract of marriage, in favour of Mrs Duff, in the event of her surviving her husband, extends only to the ipsa corpora of moveables, and does not include debts or sums of money: Found, That the clause giving to Mr Duff, &c. the moveable effects that should belong to Mrs Duff, &c. does not intitle the heirs or executors of Mr Duff to make any claim to these effects, in competition with her disponee: Found, That the executors of Mr Duff are not answerable to the Earl for the price of Forresterhill, sold during the subsistence of the marriage.——Mutual reclaiming petitions against this judgement were refused.

For the Earl of Fife, J. W. Murray, Mrs Mackenzie, D. Monypenny, } Adv. Geo. Robinson, W. S. C. Mackenzie, W. S. } Agents.

Lord Eskgrove Ordinary. Home Clerk.

May 15. 1795. Judges Preſent.

Lord PRESIDENT,

Lord JUSTICE-CLERK, Lord ESKGROVE, Lord SWINTON, | Lord DREGHORN, Lord POLKEMMET, Lord STONEFIELD, | Lord CRAIG, Lord METHVEN.

N° LXI. The Right Honourable THOMAS Lord DUNDAS, Purſuer,

AGAINST

The PRESBYTERY of Zetland, and the Reverend ARCHIBALD GRAY, their Preſentee to the Pariſh of Unſt.

A Preſentation of a miniſter to a vacant church was held to be the effectual preſentation, having been made within the ſix months allowed to patrons to preſent, and ſent off in ſuch time that it might have arrived before the expiry of the ſix months, although, from contrary winds, it was detained till after that period, and the jus devolutum had in the meanwhile been exerciſed by the preſbytery. The circumſtances under which this point was decided are theſe.

The laſt incumbent of the pariſh of Unſt died on the 24th December 1793, and on the 28th Lord Dundas's factor wrote, intimating the death, to Mr Innes, his Lordſhip's commiſſioner. This letter was ſent by a veſſel then on the point of ſailing; and a recommendation having been made by the heritors in favour of Mr Gray, the factor wrote a ſecond letter on the ſubject, tranſmitting the recommendation of the heritors: the veſſel having been put back by ſtreſs of weather, this ſecond letter was alſo ſent by her; but the was afterwards loſt, and none of the letters ever came to hand. The factor however ſent duplicates of theſe letters by a ſecond veſſel, which arrived in the end of January; and by this conveyance the firſt intimation was received by his Lordſhip's commiſſioner on the 30th January 1794.

On the 23d May 1794 Lord Dundas ſigned the preſentation in favour of Mr Nicolſon, which he immediately ſent to his commiſſioner, who then wrote to the preſentee for his letter of acceptance, and his licence and certificates, that he might forward them to Zetland alongſt with the preſentation. Theſe had not reached the commiſſioner on the 5th June, when he wrote the Zetland factor, that the preſentation was in his hands, and that he was in daily expectation of receiving the letter of acceptance, &c. all of which he would tranſmit by the firſt opportunity: They did not arrive, however, till the 16th, and he that day ſent them by a veſſel which ſailed from Leith, but the letter incloſing them did not arrive at Lerwick till the evening of the 26th of that month.

On that day (26th June) there was a meeting of preſbytery, in virtue of an adjournment from the month of March preceding; and as it was beyond the ſix months, (for the laſt incumbent had died on the 24th of December preceding), there was preſented to this meeting a petition of heritors, elders, and heads of families of the pariſh of Unſt, repreſenting, that as the ſix months had

had now elapſed, it remained with the Reverend Synod to take the neceſſary ſteps for the ſettlement of a miniſter in the pariſh, and they requeſted that Mr Gray might be appointed their miniſter. When this application was moved to the preſbytery, Lord Dundas's factor repreſented to the meeting the circumſtances ſtated in the letter of the 5th June, which he had then received, and from which they were informed that a preſentation had actually been granted more than a month before, and that it was then on its way; and he added, that he had reaſon to believe that the veſſel by which he expected the preſentation was then in ſight. The preſbytery, upon this procedure, and conſidering that the jus devolutum had taken place, put this queſtion, "Whether they "would proceed inſtantly to appoint a paſtor for the parish of Unſt, upon the "application from the heritors, &c.? Or delay it for ſome time, until a pre-"ſentation from Lord Dundas might arrive? It was carried by a majority "to proceed." The preſbytery accordingly appointed Mr Gray to the vacant church; he was called in, accepted of the office, and took inſtruments in the hands of the clerk.

This meeting took place in the forenoon of the 26th; and, as Lord Dundas's factor expected, the preſentation with the neceſſary papers came to hand that evening; and he required the moderator of the preſbytery, between ſeven and eight in the evening, "to receive the ſaid preſentation, and to proceed "in the buſineſs as required by the preſentation." But this the moderator, in conſequence of what had paſſed at the preſbytery, refuſed to do.

Upon theſe facts, a reduction and declarator was brought by Lord Dundas, calling for production of the minutes of the preſbytery; and concluding that they ſhould be reduced, and the ſettlement ſet aſide in toto. The other concluſion of the ſummons was for having it found and declared, that the purſuer has right to the patronage of the church and pariſh of Unſt; that he exerciſed his right as patron within the time preſcribed by law; and that the preſentation to Mr Nicolſon is valid and effectual, and was offered to the moderator of the preſbytery in due time: and therefore concluding, that the ſaid preſbytery ought and ſhould be decerned and ordained, by decree foreſaid, to give due obedience to the ſaid preſentation, and to proceed in the ſettlement of the ſaid Mr John Nicolſon with all convenient ſpeed, according to the rules of the church; and further concluding, that until the final end and concluſion of the proceſs to follow thereupon, or until the ſaid Mr John Nicolſon ſhall be ſettled in the ſaid church and pariſh of Unſt, it ought and ſhould be found and declared, by decree foreſaid, that the purſuer and the other heritors, liferenters, and others, liable in ſtipend to the miniſter ſerving the cure of the ſaid pariſh, are entitled to with-hold and retain the ſaid ſtipend, whether payable in money or kind, and that the ſaid Archibald Gray ſhould be prevented from taking poſſeſſion of the manſe, glebe, or other rights and privileges belonging to the miniſter of the ſaid pariſh.

This action came before Lord Eſkgrove: and the purſuer underſtanding that the preſbytery meant to object to the competency of the concluſions, in ſo far as they reſpected the reducing or ſetting aſide the proceedings of the preſbytery, on the footing, that the Court has no power to review the procedure of church-courts, a minute was given in, agreeing to depart from the reſciſſory

concluſions

concluſions, and this being admitted, the cauſe proceeded on the declaratory parts of the libel.

This cauſe came before the Court on informations, in which there were two points argued, 1ſt, Whether the ſix months run from the death of the laſt incumbent, or from the time that his death is made known, or ought to have been made known to the patron: 2d, If the time runs from the death of the laſt incumbent, whether the circumſtances that took place in this caſe be not a compliance with the law.

On the firſt point it was argued, that as the law ſtood formerly, the ſix months began to run from the time that the patron received notice of the death of the incumbent; and that the act 10th of Q. Anne, c. 12. was intended to reſtore the old law: and even the enacting words on this point, though differing from the old acts, do yet imply, that the incumbent's death muſt have come to the notice of the patron; as it is only "in caſe the patron ſhall neglect or "refuſe to preſent within the ſix months, that he loſes his right of preſentation;" and no man can be ſaid, either to have neglected or refuſed, who is ignorant of the circumſtance that is to enable him to preſent. On this point it was argued on the other ſide, that the old law was done away by the act 1690, c. 23. and the act of Queen Anne reſtored the rights of patrons under certain modifications; and that accordingly one of the conditions was, that the patron ſhould preſent "within ſix months after ſuch vacancy ſhall happen:" and it was argued, that from the ſections 6. and 7. the ſix months appeared evidently to have been meant for ſix months from the death of the incumbent; in ſhort, the meaning of the legiſlature was ſaid to be this, that by the old acts, great delay might be occaſioned, under the pretence that the patron had received no notice of the death of the incumbent; and this act was meant to put an end to that, and to cauſe the ſix months run from the death of the incumbent, leaving a ſufficient time for the patron to exerciſe his right, at the ſame time that it ſecured the intereſts of the pariſhioners.

On the ſecond point it was maintained by the purſuer, that a perſon who has given a preſentation within the ſix months, cannot be ſaid to have neglected or refuſed to exerciſe his right; and the act does not require that the preſentation ſhall be lodged within that time. The defenders did not take up that plea, but inſiſted, that the purſuer had acquieſced in the appointment of the preſbytery, by not making an appeal to the General Aſſembly, or proteſting againſt their proceedings when they proceeded to ſettle Mr Gray. On this debate the cauſe came this day to receive the deciſion of the Court.

OPINIONS.

D.—The only difficulty ariſes from the terms of the 10th of Queen Anne; but, as the civil law directs us, we are to regard the ſpirit more than the words of a law; and, in this caſe, I am convinced the preſentation was given in good time, if within ſix months after notice of the vacancy. But even the words of the act are in favour of Lord Dundas. It ſays, "in caſe the patron ſhall "neglect or refuſe to preſent any qualified miniſter to ſuch church, &c. for the "ſpace of ſix months after ſuch vacancy ſhall happen." The time within which the patron may preſent is reſtored by this act. The act uſes the expreſſion neglect or refuſe; but how can a patron be ſaid to neglect, who does

not know of the vacancy, or to refuſe, on whom no demand has ever been made? Here there was no delay; Lord Dundas did every thing in his power to forward the preſentation.

B.—I own I cannot approve of the conduct of the preſbytery, even had it been founded on ſtrict law. It is wiſe in the legiſlature to enable the preſbytery to ſupply a vacancy, when it is not filled up by the patron within a reaſonable time; but here the preſbytery knew that there was a preſentation; and the ſtep which they took was a mere catch.

As to the old law before the Revolution, the patron is within the regulation; and the intention of the 10th of Queen Anne, was to reſtore to the patron his former rights, though the time has varied. I like it better than the old law. Regulating this matter by the time of the vacancy's coming to the notice of the patron, makes an arbitrary queſtion of it; and I prefer the rule laid down by this act: at the ſame time, you have two very reſpectable writers who tell you, that it was meant to reſtore the old law. I ſhall not go into a criticiſm of theſe opinions; all depends on the terms of the preſent act; and there is nothing there to forfeit the right of the patron. Had Lord Dundas executed the preſentation beyond the ſix months, I ſhould have doubted of its validity; but here it was executed within that period, and the words of the act are, "delay or refuſe;" but he has done neither: the preſentation has been executed within the ſix months, and ſent to the poſt-office to be forwarded; but it has been delayed, by an act of Providence, beyond the time. You are not to deprive the patron of his rights, when he has done all that was incumbent on him.

I.—It always appeared to me, that it was of no conſequence at what time the preſentation was executed; and that it muſt have been given to the preſbytery when the proof of the oaths is required, &c. Patrons have many advantages by the new law, which they had not by the old.

E.—The time is to run from the period of the probable knowledge of the patron; but is this to be the rule, when the patron is in the Eaſt Indies? I have doubts on the words of the act; and I doubt much whether it be in the power of the preſbytery to renounce the jus devolutum.

A.—I am neither the friend of patronage, nor an enemy to it, further than as it is the law of the land. I do not go into the old law, and I agrèe, that it would not avail when the patron was in the Eaſt Indies. I am glad that the act has fixed it. But there is not one word in the act which ſays, that when the patron has not neglected, within the ſix months, to preſent the miniſter, that he ſhall loſe his right of preſentation. But the patron, in this caſe, has not neglected to preſent, he has done it in due time; he has even remitted it in due time, barring accidents; and therefore, there ſurely can be no forfeiture. This is ſimilar to the caſe of Lord Blantyre.

C.—A perſon cannot be ſaid to have refuſed or neglected to preſent, who has actually preſented, and done every thing to forward the preſentation within the ſix months.

State of the vote: Suſtain or Repell the defences.—Carried, Repell the defences, with the exception of Lords Dreghorn and Polkemmet.

The

The Lord Preſident was for repelling.

The judgement pronounced, was, Repell the defence, and declare in terms of the declaratory concluſions of the libel. But one of theſe concluſions being, that the heritors ſhould be allowed to retain their ſtipends, it was apprehended, that thoſe who were favourably inclined to Gray, might chuſe to pay their ſtipends to him, in order to prevail on him to remain in the charge, an alteration of the judgement was prayed by the purſuer, to the purpoſe of enabling him, as patron, to diſpoſe of the ſtipend; and with this application the Court complied. There was no reclaiming petition for the preſbytery.

For the Purſuer, Charles Hay, } Adv. Charles Innes, W. S. }
Defenders, George Fergusſon, } Adv. J. M'Ritchie, } Agents.

Lord Eſkgrove Ordinary. Menzies Clerk.

May 20. 1795. Judges Preſent,

Lord PRESIDENT,

Lord JUSTICE-CLERK,	Lord POLKEMMET,	Lord DUNSINNAN,
ESKGROVE,	MONBODDO,	CRAIG,
SWINTON,	STONEFIELD,	GLENLEE.
DREGHORN,	ANKERVILLE,	

N° LXII. The MANAGERS of KING JAMES VI's HOSPITAL of PERTH,

AGAINST

The PATRONS of BUTTER's and JACKSON's MORTIFICATONS.

THE queſtion betwixt the parties in this cauſe was, Whether the rents of certain mortified ſubjects were veſted in the managers of the King's Hoſpital, under the burden of ſupporting five paupers in that hoſpital; or veſted in them, for behoof of theſe paupers, to whom they were bound to pay the whole rents?

James Butter executed a deed (1670), by which he "mortified, aſſigned, and "for ever confirmed," to the maſters of the ſaid hoſpital, certain lands therein ſpecified, "for maintenance of four poor perſons in the ſamen hoſpital for "ever;" the rents of which ſubjects extended to three chalders two bolls of victual, half oat-meal, half bear, and two dozen of poultry. "The which "yearly rent and duty, he hereby willed, required, and deſired to be employed, uſed, and beſtowed, for and towards the ſuſtentation and maintenance, in "the ſaid hoſpital of the ſaid burgh of Perth, of any four poor perſons," "theſe perſons having paſſed the age of threeſcore, and having been found "to have lived induſtriouſly in their former years; and, as oft as any of the "ſaid four poor perſons places happens to vaik, that the provoſt, bailies, and "miniſters of the ſaid burgh, who are hereby appointed patrons of the ſaid "mortification, ſhall nominate and appoint any other poor perſon of the age "and qualification above expreſſed, to ſucceed to the benefice of the ſaid place "ſo vacant as aforeſaid; and the ſaid four perſons are to be equal partakers "of the ſaid benefice or rent, for their ſuſtentation, or help for ſuſtentation,

"during

" during their reſpective lifetimes," &c. The precept of ſeiſin directs ſeiſin to be given to the maſters of the ſaid hoſpital of Perth, and their ſucceſſors in the ſaid office for ever, by deliverance of earth and ſtone, &c.

Alexander Jackſon, by a ſimilar deed, (1686), " Mortified, aſſigned, and " diſponed, and for ever confirmed, to and in favour of the ſame hoſpital, " and to and in favour of the managers thereof, and their ſucceſſors, maſters " thereof, for maintenance of a poor perſon for ever, in manner under " written, all and haill," &c. The deed goes on in the ſame terms with the former; only it gives a preference to poor perſons " of the kindred of the " deceaſed." The rent of this laſt ſubject is ſaid to be ſix bolls bear, ſix bolls of meal, and ſix poultry.

The property which was thus conveyed has riſen in its value, and yields now a yearly rent which, being divided amongſt the five beneficiaries, would give them nearly forty pounds a-year each; and, in place of reſiding in the hoſpital, they have been in uſe to reſide in houſes of their own.

The terms in which the preſentations have been in uſe to be given, are theſe: " Whereas an juſt and equal fourth part of the free yearly rent is now " vacant at our diſpoſal, by the death of ——, therefore, we do hereby pre- " ſent to the maſters and other managers of the ſaid hoſpital ——, as a perſon " intitled, in terms of the deed of mortification, to be one of the four elymo- " ſiners upon the foreſaid mortified lands, to whom we give and grant a juſt " and equal fourth part of the yearly rent thereof, for the half year, &c. " with full power to the maſters of the hoſpital, preſent and to come, to " beſtow and pay the foreſaid fourth part of the free yearly rent to the " ſaid ——."

In the year 1790, the managers of the hoſpital came to the reſolution of rejecting every preſentation which did not bear, in terms of the original deeds, that the ſums payable to the beneficiaries was " to be employed and beſtowed " for and towards their ſuſtentation and maintenance in the hoſpital of the " burgh of Perth." The managers alſo reſolved to reſtrict the allowance to the amount of the rents as they ſtood at the time of the donation, eſtimating the victual by the preſent fiars.

Theſe proceedings brought the matter into the Court of Seſſion, where there were mutual actions of declarator, all turning on the queſtion, Whether the managers were the proprietors of the mortified lands, burdened with the maintenance of five perſons in the hoſpital; or merely factors, bound to collect the rents of the ſubject, and divide them amongſt the five, leaving them to enjoy theſe rents where and how they pleaſed.

The queſtion was taken to report by Lord Stonefield, on informations, when the following opinions were delivered.

OPINIONS.

B.—It is the duty of this Court to guard the will of the dead, and to take care that it ſhall receive full effect; and I would give the ſame liberal conſtruction to a deed of mortification as to a will. It is clear to me, that the ſubjects are veſted in the hoſpital; yet it is ſolely for behoof of the perſons who may be preſented by the patrons. Every word of theſe deeds ſhows, that you cannot

draw

draw one fraction from the preſentees; and even were you of opinion, that the produce of the lands were now out of all bounds for poor people, the reverſion would not go to the hoſpital, but to the heirs of the donor. I can ſee that the increaſed funds will put the preſentees on a better footing than the other poor people; but it is of no conſequence where they reſide; and when the funds are increaſed, I ſee no reaſon why theſe people ſhould be alimented in the old penurious way.

C.—This matter appears to me in the ſame light: and ſure I am, that nothing can come to the hoſpital; the ſurplus muſt go either to the heirs of the donor, or to the patron; and I ſhould doubt very much, whether the patron could enlarge the number of people to be alimented. There is no controul on the patrons, in regard to the deſcription of perſons to be preſented, further than, that they ſhall be paſt ſixty years of age, and unable to ſupport themſelves; but there is nothing which obliges them to reſide in the hoſpital. I have heard of a donation in England, made to ten poor people, which, by the improvement of the property, had riſen to L 1000 a-year: and there is one hoſpital in England where the appointment of the maſter is worth L. 700 a-year, from his ſupporting the original number of the inſtitution, and putting the ſurplus into his own pocket; but I hope ſuch a thing will not happen in this country. In this caſe, the managers muſt divide the funds fairly amongſt the preſentees.

D.—The deed of mortification in the caſe of Jackſon ſpecifies ſix bolls of meal and ſix bolls of bear; and when he comes to diſpone, it is "the whilk yearly "rent," &c. that he conveys to the beneficiary. This was ſufficient for the maintenance of a poor perſon; and it is the voluntas teſtatoris to which we ought to look. It is very common to enlarge the number, as the income increaſes: and here I am clear, that it muſt have been the intention of the donors to give the eſtate to the maintenance of poor people reſiding in the hoſpital; and of courſe, to increaſe the number of the perſons preſented as the income increaſed.

A.—What might be the conſequence, were the income of this property to increaſe to a large ſum, (L. 1000 per annum, for inſtance,) I do not know: An application might be made to the legiſlature; or perhaps this Court might interfere, and reduce the allowance for the preſentees to a reaſonable yearly ſum. But at preſent there can be no occaſion for that; for each of the five perſons receives no more than about L. 40; and although that may be a great ſum for perſons of their deſcription, it is not enough to authoriſe us to interfere: beſides, I think it more than probable, that theſe five people, who now draw L. 40 a-year, are in no better a ſituation than the firſt five who were named, and who drew the rents that were ſpecified in the deeds. But, at any rate, there is no reaſon for our making thoſe ſtretches which we are here requeſted to make. Neither do I ſee any reaſon why theſe perſons ſhould reſide in the hoſpital; the reſidence there is a favour to the preſentees, which they may or may not accept of, as they ſee proper.

D.—Then put into your judgement *in hoc ſtatu*, and I have no objection to it.

B.—I am not clear what I would do, if the cauſe came back to us on the footing of the annual income being too large.

A.—We ſhall decide that cauſe when it comes.

The Lords found the perſons preſented, in terms of the deeds of mortification, to have right to the whole free rents and produce of the mortified funds;—that it is not neceſſary for the preſentees to reſide in the hoſpital; and that the managers have no right to apply any part of the mortified funds to the expence of this litigation, as the ſame will fall to be paid out of the general funds of the hoſpital, for the increaſe of which the litigation was undertaken: And they aſſoilzied from the declarator, and ſuſpended ſimpliciter.

For the Managers, Patrons, Allan Maconochie, Ro. Craigie, } Advocates. John Moir, W. S. Wm Beveridge, W.. } Agents.

Lord Stonefield Ordinary. Home Clerk.

N° LXIII. JAMES LEE, Tailor in Leith,

AGAINST

The Executors of ROBERT WATSON, Merchant in Edinburgh.

ROBERT WATSON gave L. 125 with his daughter, Jean Watſon; and became bound, at his death, that his heirs ſhould pay her huſband George Lumſdain a like ſum. George Lumſdain was guilty of forging the names of ſeveral perſons as indorſers of bills, which he diſcounted; and his affairs going into diſorder, his father-in law, Robert Watſon, to ſave him from a proſecution for forgery, took up theſe bills to the amount of L. 600 Sterling.

In the ranking of Lumſdain's creditors, a claim was entered for the father-in-law for the money which had thus been advanced; but the Court conſidering it to be an illegal tranſaction, for the purpoſe of ſkreening Lumſdain from juſtice, refuſed to ſuſtain it: and the debts due to the bankrupt-eſtate being expoſed to ſale, the claim to the L. 125, due at Mr Watſon's death, was purchaſed by Lee, the purſuer, though a proteſt was entered againſt the ſale.

The defence here was, That although the claim againſt Lumſdain's eſtate, founded on the retired bills, might be ineffectual; yet here, where the purſuer came to demand a debt in the name of Lumſdain, the bills ought to afford a ground of compenſation. But the Court thought, that the ſame reaſon which deprived the creditor in theſe bills of his claim on the bankrupt-eſtate, ought to operate in this caſe, and to defeat equally his plea of compenſation. One of the Judges obſerved, that as Lumſdain's wife and her children had been ſupported by Robert Watſon, the father, and as they might have a claim for aliment, that claim ought to be reſerved.

The Court therefore unanimouſly repelled the defence, leaving entire the daughter's claim for aliment.

For the Purſuer, John Connel, Defender, John Clerk, } Advocates. J. A. Higgins, W. S. Geo. Tod, } Agents.

Lord Abercromby Ordinary. Home Clerk.

May 21. 1795. Judges Preſent,

Lord PRESIDENT,

Lord JUSTICE-CLERK,	Lord POLKEMMET,	Lord ABERCROMBY,
ESKGROVE,	STONEFIELD,	CRAIG,
SWINTON,	ANKERVILLE,	GLENLEE.
DREGHORN,	DUNSINNAN,	

N° LXIV. JAMES LINDSAY and Company, Wood-merchants in Glaſgow, Chargers,

AGAINST

GEORGE JONES, Proprietor and Manager of the Amphitheatres of Edinburgh and Glaſgow.

THIS was a queſtion of damages, for failure to implement a contract. The chargers became bound "to erect and finiſh a riding houſe, for "William Parker and George Jones, upon the ground in Jamaica Street of "Glaſgow; and to build, roof in, and completely finiſh the ſaid riding-houſe, "betwixt and the term of Martinmas firſt," (1792), under the penalty of L. 500 Sterling.

Jones, who came to have the ſole right to the ſubject, calculated that he would be able to finiſh the plaſter-work, erect his ſtage, and paint his ſcenes, betwixt Martinmas and the 2d February following; and he engaged performers from that date. Jones went to Glaſgow ſome time before Martinmas; and, as he ſays, urged the chargers to have the work finiſhed according to their agreement; but at the term only one fourth of the ſlating was finiſhed; nor was the whole completed till the end of December; during which time, the workmen were incommoded, and at ſome times interrupted in their work; and in fact the houſe was not ready to be opened until the 28th of February; ſo that, during the whole of that month, he had not only the ſalaries of his performers and ſervants to pay, but the principal performers were, by the delay, unable to act ſo often as they had engaged to do.

Jones, the ſuſpender, had never taken a proteſt againſt the chargers; and it was not very clearly made out from what cauſe the delay had ariſen, whether from the ſtate of the houſe, or from the neglect of the tradeſmen who were engaged to complete the ſtage, and boxes, and painting, each party endeavouring to throw the blame on the other. The damage which was incurred was of two ſorts; one, the expence of wages to performers, and ſupporting ſervants and horſes while they were not acting, which it was eaſy to aſcertain; the other was of a hypothetical nature, depending on the additional ſums which it might be ſuppoſed would have been drawn by Jones, had the plaſter-work been dry; had his exhibitions begun earlier in the ſeaſon; or his performers remained with him the number of days which they were bound to have done, and would have done, had he opened the amphitheatre on the 2d in place of the 28th February.

Theſe

Theſe damages were claimed in a proceſs brought before the magiſtrates of Glaſgow by the chargers, in which proceſs a judgement was pronounced, which, " in reſpect that it is not alledged, that betwixt Martinmas 1792, " when the building was to be finiſhed, and ſix weeks thereafter when it is ad- " mitted that the work was executed, no proteſt was taken or complaint made, " a ſilence forming a legal and ſatisfactory preſumption that the building was " finiſhed with as much convenient ſpeed as the nature of ſuch an undertaking " could admit, finds the chargers were not in any culpable mora in performing " their part of the contract; and therefore repells the defence founded on " a claim of damages, for neglecting to finiſh the work by the time fixed by " the contract; which damages, from the ſtatement thereof given in the de- " fence, appear to be vague and indefinite, and in a great meaſure conjectural; " and decern for the principal and intereſt libelled on."

Of this judgement a ſuſpenſion was preſented; and the queſtion, properly ſpeaking, before the Court was, Whether the bill ought to paſs, and upon what kind of caution? yet, as the whole cauſe had come before the Court on memorials, and the proof on both ſides had been printed, their Lordſhips thought it more for the intereſt of the parties to decide the principal queſtion in this ſhape.

OPINIONS.

B,—the Judge who ſpoke firſt, was for giving damages, ſince it was very clearly proved that they had been incurred.

B,—the Judge who ſpoke next, began, by reading the judgement pronounced by the magiſtrates. There is a great deal of good ſenſe in this interlocutor; and I am inclined to be of the opinion which is there expreſſed. It is very true, the work, which the chargers were bound to have performed, was not executed at the time ſpecified in the contract; but there is a good anſwer to that, when they ſay that there was no culpable neglect on the part of the chargers. But what I place my opinion upon is this, that after the chargers had finiſhed all their work, it was not immediately fitted up as a place of public amuſement. It was another ſet of workmen who were to finiſh it; and theſe people got acceſs ſooner than the term of Martinmas; they were working in the houſe before that term. The want of the ſlating may have been an inconvenience to the workmen; but it does not appear to me to be ſufficient for founding a claim of damages. What confirms this is, that the ſuſpender makes no complaint of the inconveniency to which he was put. The receipt which was taken from the chargers, it is ſaid, contains a reſervation of the claim; but this ſhows very clearly the ſuſpender's notion of the matter; for, in place of reſerving a claim of damages, the ſuſpender ought to have refuſed to make payment *. Upon the whole, I am for no damages.

* It ſhould have been explained in ſtating the caſe, (though it anſwers its purpoſe equally well here), that when the ſuſpender made a ſecond payment to the chargers, which was equal to the price of the building, he was due as much more for wood furniſhed, as was equivalent to his claim of damages; ſo that, in place of paying up the price of the Circus, and reſerving an action of damages, he retained part of the price of the building to anſwer that claim; for the receipt bore the payment to be in part of the price of the Circus, and of the wood furniſhed.

C.—

C.—The agreement entered into betwixt the parties, bound the charger to have the houſe finiſhed againſt the term of Martinmas; and this building was neceſſary for the ſuſpender, as it afforded the means by which he was to make his bread; now although you may not give the penalty, you will certainly give the damages which have been ſuſtained; and this is all that has been demanded in this caſe; for the ſuſpender does not claim upon the ſtrict terms of his contract. To this it has been thought to be a ſufficient anſwer, that the ſuſpender ought to have taken a proteſt: but I have never heard of any law, which requires that a proteſt ſhould be taken to preſerve ſuch a claim; and I ſee there was one reaſon, that the man was not in the country till after Martinmas. It is ſaid further, that he paſſed from all objections, by paying up the price: but this I hold to have been rather in his favour; and I can put no weight on this. It is next ſaid, that no damages have been proved to have ariſen from the chargers delay; and no doubt, had there been a proof to ſhow, that, even had the chargers performed their part, ſtill the houſe could not have been fitted up betwixt Martinmas and the 2d February, I ſhould have agreed in this: but there is no ſuch proof; and I cannot reſiſt the contrary proof, which I ſee in this caſe. The chargers themſelves admit, that the ſuſpender muſt have a claim ſomewhere when they bring their action againſt the ſlater; and it is juſt ſaying, in other words, we are not liable, the fault lay with this man. There is another anſwer which has been made for the chargers: they ſay, that they gave acceſs to the ſuſpender before the term; but I agree with the ſuſpender, that this was no favour; the ſubject was his own, and the chargers could not have kept him out. But I am clear, that had the roof been on and the houſe finiſhed at the term, the ſuſpender would have had no interruption in the work within doors; whereas, the want of a roof made the place very improper, either for plaſtering the walls, putting up the bound work, or painting the ſcenes. And with regard to the damage, I ſee here a real damage ſuſtained by the charger, where he pays a great ſum for the maintenance of horſes and ſervants, and wages to performers, during the time that the houſe could not be opened. The other damages, from the want of company, is of a more doubtful nature. I am therefore for paſſing this bill on the caution offered; and as in ſtrict law he is intitled to L. 500 of damages, I think, ſince he has reſtricted that to his real damage, he ought to have it.

M.—It rather appears to me in the ſame light: But Jones has paid the price of the houſe, reſerving to himſelf only a claim of damages; now the demand made by the chargers, is for wood furniſhed to the ſuſpender; the account is admitted; and in this ſituation, the demand of the chargers cannot be compenſated by the illiquid claim of damages made by the ſuſpender.

A.—There is a fact which I want to know. I ſee it is very clear, that the work was not finiſhed, from the want of Welſh ſlates: Now I have been looking into the contract, to ſee whether there is any clauſe of it which provides that the ſlates ſhall be Welſh, and not Scotch ſlates; for had they taken Scotch, the work would have been finiſhed; but from there being no more Welſh ſlates in Glaſgow, it was delayed. Now, as there is no clauſe in the contract which fixes this, I preſume it muſt have been done by a verbal communing; and

this Jones, who, I fancy, is a Welſhman, may have inſiſted for Welſh ſlates, and ſo delayed the finiſhing of the houſe.

The Dean of Faculty ſtated, that this circumſtance was in favour of Jones, not againſt him; for in his contract there was no particular ſpecies of ſlates fixed on; and therefore it was natural to ſuppoſe that Scotch ſlates were meant: but the charger, in their agreement with the ſlater, ſtipulated for Welſh ſlates, which are conſiderably cheaper; ſo that the delay happened from the agreement made by the charger with his ſlater, and from which a ſaving aroſe to the charger.

I am ſatisfied, however, that there is no proof of damages. The inſide work might have been done, and in fact, was done, without any interruption either from rain or from ground water, though that laſt was owing to the operations of Jones himſelf. The proof affords me a complete conviction, that the want of the ſlating is a mere pretence; and that the inſide work was not delayed one ſingle day on that account; and conſequently, that no damages ſhould be awarded againſt the charger.

I would incline to ſettle this matter by a preſent judgement; and therefore I am for refuſing the bill. The judgement of the magiſtrates I conceive to be founded in juſtice and good ſenſe.

State of the vote: Paſs or Refuſe the bill.—PASS, Lords Eſkgrove, Swinton, Dreghorn, Polkemmet, Ankerville. REFUSE, Lords Juſtice-Clerk, Stonefield, Dunſinnan, Abercromby, Glenlee.

The Lord Preſident gave his caſting vote for refuſing the bill.

A reclaiming petition for Jones, againſt this judgement, was refuſed.

For the Chargers, Robert Davidſon, Suſpender, D. of Faculty, & H. D. Inglis, } Adv. Ja. Davidſon, W. S. Wm Inglis, W. S. } Agents.

Lord Dreghorn Ordinary. Bill Chamber.

June 2. 1795. Judges Preſent.

Lord PRESIDENT,

Lord JUSTICE-CLERK,	Lord POLKEMMET,	Lord CRAIG,
ESKGROVE,	ANKERVILLE,	METHVEN.
SWINTON,	DUNSINNAN.	GLENLEE.
DREGHORN,		

N° LXV. Mr and Mrs LASHLY,

AGAINST

THOMAS HOGG, Eſq; of NEWLISTON.

MANY queſtions have ariſen betwixt theſe parties, reſpecting the ſucceſſion of the late Mr Hogg, their father. Mr Hogg left a landed eſtate in Scotland, as well as moveable property; he alſo left perſonal property ſituated in England, to a conſiderable amount. This fortune he ſettled upon the defender by a general ſettlement, burdened with certain proviſions to the younger children

children, and containing a declaration that these provisions should be in full of their legitim, &c. But Mrs Lashly, his daughter, who had married without his consent, and without a contract of marriage, rejected the provision which was made for her by her father's settlement, and betook herself to her legal provisions; that is, to the legitim, and a share of her mother's half of the goods in communion, the marriage having been dissolved by the predecease of Mrs Hogg.

I. Upon the claim of legitim several questions arose; for, 1. The heir pleaded a general defence, founded upon certain acts of homologation of the provisions given to Mrs Lashly by her father, which implied a renunciation of the legitim. This plea the Court over-ruled, and found Mrs Lashly intitled to her legitim. 2. The next question that occurred was, Whether this claim extended over the funds situated in England? and this gave rise to a very interesting decision in the law of succession: for it was at that time understood to be fixed by several decisions, that in intestate succession, the lex rei sitæ was the rule; but the doctrine coming to be canvassed on this occasion with much accuracy, the Court were clearly of opinion, that the principle on which they formerly proceeded was erroneous, and that the lex domicilii afforded the only equitable rule for intestate succession. In this question the Court went farther, (and the decision was supported in the House of Peers); for they found, that although Mr Hogg had made a settlement, which excluded the claim of legitim; yet as that settlement had no effect to exclude this claim, so far as regarded the Scotch funds, neither could it have any effect on the funds in England. Thus Mrs Lashly succeeded in establishing her claim of legitim, and in her plea for extending it over the English funds *. 3dly, Another important question occurred; for it having been said, and held for granted, that the rest of the younger children had renounced their legitim, Mrs Lashly claimed the whole bairns part, as devolving upon her: the question then was, Whether, by these discharges, the other younger children conveyed to the father their interests in his moveable estate, so as to enable him to dispose of it; in which case, it would have been carried to the defender by the general settlement? or, Whether the effect of these discharges was to enlarge the claim of those children who had not discharged? In this plea too, Mrs Lashly was successful; for it was found, that the renunciation of the legitim by one child, has the same effect which the renouncer's natural death would have, and enlarges the claim of the children who do not discharge.

II. Then came the claim for the mother's half of the goods in communion; and as this claim would not have been effectual, had Mr and Mrs Hogg been residing and domiciled in England at the dissolution of the marriage, the fact of the domicil at that period came to be very keenly disputed.

The facts stated by the parties were these:

The late Mr Hogg went early in life to London; became a merchant; engaged in the Italian and Levant trade; and in the 1752 had made

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* 7th June 1791, Hogg against Hogg.—Fac. Col. N° 185, and Bell's Cases, title Succession, Lashly against Hogg, p. 491.

a fortune of L. 23,000 Sterling. In this year he purchaſed the eſtate of Newliſton; and, at the ſame time, having engaged Mr Farquhar Kinloch to carry on his buſineſs in London, by procuration, till Chriſtmas 1753, he, in the intermediate period, came down to Scotland. In the beginning of the 1754, a contract was entered into betwixt Mr Hogg and Mr Kinloch, to endure for three years; and one of the articles was, that "the buſineſs ſhould be carried "on in the dwelling-houſe, counting-houſe, or ware-houſe of Roger Hogg, "ſituated in Baſinghall ſtreet, London:" And "in regard Mr Hogg was "chiefly to reſide in Scotland during the continuance of this copartnerſhip, "Mr Farquhar Kinloch was to reſide in Mr Hogg's houſe in London, and "carry on the buſineſs, with an allowance of L. 150 for the neceſſary expence of "houſe-keeping, including dinner for the two clerks, and wages for the houſe-"hold ſervants." But if Mr Hogg ſhould return "in the winter ſeaſon with his "lady and any part of his family," the expence of houſe-keeping was to be borne by him, Mr Kinloch "allowing L. 56, 5 s. being three eighths of the ſaid "ſum of L. 150, the agreed partnerſhip-charge of houſe-keeping."

This partnerſhip took place in the 1754. Mr Hogg remained in London till June of that year, when he came down to Scotland, and remained there till October 1756. In October 1756, he ſent his ſons to the Univerſity of St Andrew's, and returned to London with Mrs Hogg and two of his daughters, and there they remained till June following, when they returned again to Newliſton. The contract, which was to expire in the beginning of the 1757, was, during Mr Hogg's viſit to London, renewed for four years longer. It was in June 1757 that Mr Hogg came down to Newliſton; and he remained there till November 1758, when he returned to London: he ſtaid in London till July 1759, at which time he appears to have been in very bad health; and it is ſaid, that Mr Hogg, truſting for his recovery to the effects of exerciſe and his native air, went with this view to Newliſton. But previous to this, he had executed a further prorogation of his partnerſhip with Mr Kinloch for five years.

In the end of the year 1759, he was ſo far conſidered as a reſidenter in London, that he was elected conſtable of the ward; and he had a leaſe for ſeven years of the houſe in which the buſineſs was conducted, the poſſeſſion of which, for theſe ſeven years, he expreſſes himſelf as reſolved to keep.

This was the ſtate of matters in February 1760, when Mrs Hogg died at Newliſton; and the queſtion is, Whether Newliſton, or the houſe in London, was to be conſidered as the place of Mr Hogg's domicil?

On the one hand are produced many mercantile letters of the late Mr Hogg, in which he expreſſes his intention of carrying on buſineſs; as in a letter to Meſſ. Mansfield and Hunter, he ſays, "I intend to ſupport my houſe here for "a long ſeries of years" (1759);—while, on the other hand, many letters of private correſpondence are founded on, in which he ſpeaks of Newliſton as "his home," and rejoices in the effects of his retirement from the fatigues of buſineſs. In a letter to Mr Meſſing, he ſays, "I live quite at home, as my "whole purſuit is the education of our children, and domeſtic happineſs." To Mr Lindon: "I have been here ſince my laſt, attending to the education

"of

" of ſix children, &c. I acquire great health, and paſs my time very agree-
" ably in a country life, in looking after a landed intereſt I have in this place."
Theſe letters were written from Newliſton in the 1758, and they correſpond with the plan which, in the 1752, he had explained to his brother: he ſays, " I have weighed my deſire of quitting buſineſs with all the attention I
" am maſter of, &c. I feel a good deal, and think I have had labour enough
" to be ſatisfied with retirement, provided my ſubſtance intitles me to that
" eaſe I have in view, and the proper education and proviſion of my chil-
" dren, which I hope would be the caſe, if I am lucky in the purchaſe of a
" ſolid rental." Speaking of his purchaſe of Newliſton, he ſays, " God
" grant it may anſwer my future views; my country claimed juſtly ſuch at-
" tachment from me; as, to this connection, and my own induſtry, I owe my
" ſucceſs in life, beſides an unlimited affection for it."

The judgement of the Lord Ordinary on this point was, " Finds, that Mr
" Hogg at the time of his death had two domicils, one in London, and ano-
" ther in Scotland, and that the laſt was the principal." But his Lordſhip alſo found, " that the change of domicil ought not to operate any change on any of
" the rights pre-eſtabliſhed in Mr and Mrs Hogg in the country in which they mar-
" ried, unleſs they be incompatible with the morality or religion of the country
" to which they have removed;" and on this ground his Lordſhip rejected Mrs Lathly's claim to any ſhare of the moveables falling, by the law of Scotland, to the heirs of the wife.

The queſtion came before the Court, upon mutual petitions and anſwers, on the 25th November 1794, when the following opinions were delivered:

OPINIONS.

K.—This is a difficult and delicate queſtion. I cannot agree with the premiſſes of the interlocutor, that the alteration of the domicil made no change upon the rights of the parties, for the rule is, Uxor ſequitur domicilium mariti. The queſtion turns then upon this, Where was the huſband's domicil? This is one of thoſe queſtions which naturally ariſe from the deciſion, that the lex domicilii, rather than the lex rei ſitæ, ſhould be the rule of ſucceſſion in inteſtate ſucceſſion: that being now the eſtabliſhed rule, we ſhall have various queſtions to decide, as to what and where the domicil is. There are certain general rules upon the ſubject of domicils, as that, where there has been a domicil eſtabliſhed, a new one is not to be preſumed; and that the vetus domicilium is to be preferred. It ſeems odd indeed to ſay, that a man can have two domicils; but ſo it is laid down; and though Julian doubts of the propriety of the rule, yet it has been found to exiſt. The queſtion in the caſe before us is, Whether Mr Hogg had two domicils? and if he had two, by which of them ought his ſucceſſion to be regulated? A domicil is defined to be, ubi quis larem, rerumque, ac fortunarum ſuarum ſummam conſtituit. Now, Mr Hogg was reſiding in Scotland; but he, at the ſame time, had declared his intention of carrying on his buſineſs for ſome years in London; and his reſidence here, was merely to improve his eſtate, and for pleaſure and amuſement. His reſidence at Newliſton was the ſame as if he had reſided at his country-ſeat in the neighbourhood of London; and if we hold this to be his domicil, by the ſame rule it would be neceſſary to confirm, before the commiſſary of Linlithgow, for inſtance,

the teſtament of a banker who had a country houſe on the other ſide of Cramond-bridge. I ſhall ſuppoſe that Mr Hogg had become bankrupt, his eſtate muſt have been diſtributed by the Engliſh law; for in that country he had his houſe, his books, his principal domicil: it was there he had larem rerumque ſuarum ſummam. It has been ſaid, that the houſe in London was the company-houſe; but at this rate, if he had had no eſtate in Scotland, it might have been poſſible to have proved that he had no houſe at all. In the London houſe we ſee him informing his correſpondents, that he was to carry on his buſineſs for years. He was a London merchant in ſhort; he had his domicil there; it was beſides his old domicil; ſo that, were it poſſible for a man to have two domicils, (which I agree with Julian is doubtful), I am of opinion, that Mr Hogg's principal domicil was in London; and the rule is, that uxor ſequitur forum mariti.

B.—The Lord Ordinary has found, that there are two domicils; and I think there may be two to a certain extent, for inſtance, to the effect of validating a citation: but I have great doubts of the propoſition when you carry it the length of regulating the ſucceſſion. I ſhall ſuppoſe, that a merchant in the town of Annan has a ſmall villa on the Engliſh ſide; it would be odd, upon his death, to find that one part of his property muſt be divided by the Engliſh law, and another part by the law of this country. This is impoſſible; there can be but one domicil to this effect; and the whole property muſt be conſidered as lying within that domicil: it is impoſſible there can be two. The queſtion therefore is, Where was Mr Hogg's domicil? I agree with the opinion which has been delivered, that London was his domicil: for when a merchant has his houſe and his buſineſs in London, and muſt be there during the whole year, although he may come occaſionally on a viſit to Scotland, I ſhould hold London to be the place of his domicil. At the diſſolution of the marriage by the death of Mrs Hogg, the domicil was in London; and of courſe it is there that Mrs Laſhly muſt follow out her right.

E.—I never thought that a perſon could have two domicils to the effect of conveying his property, though in ſome reſpects I think he may be conſidered as having two domicils. But in regard to his ſucceſſion, that is to be regulated by the law of his principal domicil; and in this caſe I hold Mr Hogg's principal domicil to have been in this country. The preſumption in dubio is, that a man's domicil is in his native country.

A.—This is a queſtion of ſome difficulty. A partner in a mercantile houſe may have his dwelling-houſe and domicil in another country. Mr Hogg's buſineſs was carried on by his partner; and he came with his wife and family to Scotland; there he chiefly reſided, returning at intervals to London: I rather think, though he might have had a domicil to ſome effects in London, that his principal domicil was in this country. I have no notion of two domicils in a queſtion of ſucceſſion. In the late caſe of Sir Charles Douglas, the queſtion was, Where was he domiciled? And you were of opinion, upon ſlighter grounds than occur here, that his only domicil was in Scotland. There is a cauſe in this day's roll, where the deceaſed, who was governor of a fort in Jamaica, had come over for his health, and intended to have returned to Jamaica, where he had ſlaves and property. But you thought that his living here eight or nine months, and dying here was ſufficient to give him a domicil in this country.

C.—I

C.—I rather incline to the opinion, that the domicil was in Scotland. We muſt take the caſe, that Mr Hogg had died, in place of the wife; and, according to the deciſions you have pronounced in many caſes, you would have regulated the ſucceſſion by the law of Scotland. I can give no effect to the circumſtance of his going backward and forward to London; for, although there may be two domicils to ſome effects, I do not think there can be two to the effect of diſtributing property; and I think the novum domicilium muſt have the preference.

The judgement pronounced on this point was in theſe terms: Find, That the deceaſed Mr Hogg, at the diſſolution of his marriage, had his domicil in Scotland; and, before anſwer as to the queſtion, How far Mrs Hogg's executors, at the diſſolution of the marriage, had a right to one third of the goods in communion, appoint counſel to be heard thereon in their own preſence.

Againſt this judgement a petition was preſented for Mr Hogg, when the Court, before anſwer, ordered parties to give in mutual memorials on this point, Where the deceaſed Mr Hogg had his domicil, at the time of the diſſolution of the marriage: and on adviſing theſe memorials, the following opinions were delivered:

OPINIONS.

B.—I am of opinion, that the domicil in this caſe was in Scotland. In general, where a perſon is carrying on mercantile buſineſs, the place where that is carried on is the place of his domicil, and that, although he may withdraw himſelf for a time from the place where his buſineſs is conducted, either for health or for pleaſure. But I ſee here, that Mr Hogg was arrived at that time of life when he wiſhed to retire from buſineſs; and that it was a great object with him to ſettle in Scotland. In order to attain this object, he made a moſt material alteration on his plan and manner of conducting buſineſs. He committed the charge of every thing to Mr Kinloch, that he might have an opportunity of following his favourite plan. The houſe which was kept in London, I do not conſider ſo much as the houſe of Mr Hogg, as that of the Company. I am therefore of opinion, that Mr Hogg's domicil was in Scotland.

Several of their Lordſhips declared themſelves to be of the ſame opinion.

E.—It has been ſaid, that the idea of two domicils is clumſy and unphiloſophical: but I do not think ſo. Had Mr Hogg given up his houſe in London, and come down to Scotland, then he would have had only one. But the domicil is a matter of fact: certainly a man may have ſeveral; and when that is the caſe, the queſtion muſt neceſſarily be, Which is the principal?

When a man has domicils in different countries, his principal domicil will be held to be in his native country. In the common caſe, the domicil of the eſtate will be preferred; and I think, that all theſe conſiderations concur to ſhow that in this caſe the domicil was in Scotland.

D,—Another Judge, read two letters to prove Mr Hogg's intention to remain in this country.

The Court adhered unanimouſly to the former judgement, by which they found, That at the time of the diſſolution of the marriage, Mr Hogg was domiciled in Scotland.

There

There remains then to be decided, the queſtion as to the goods in communion, on which counſel are to be heard. The deciſion of this point will be ſeen, 16th June, No. 73.

For Mr & Mrs Laſhly, John Clerk, M. Roſs & W. Honyman, } Adv. Ja. Gibſon, W. S. Lach. Duff, W. S. } Agents.
For Mr Hogg, John Clerk, M. Roſs & W. Honyman, } Adv. Ja. Gibſon, W. S. Lach. Duff, W. S. } Agents.

Lord Dreghorn Ordinary. Sinclair Clerk.

N° LXVI. Thomas Hogg, Eſq; of Newliſton, raiſer of a multiple-poinding,

AGAINST

Mr and Mrs Lashly, and the Truſtees for the Creditors of Mr Alexander Hogg.

THE nature of the queſtions which have ariſen in relation to the ſucceſſion of the late Mr Hogg of Newliſton, have been explained in the introduction to the preceding caſe. In arguing the queſtion upon the right of legitim, it was taken for granted by both parties, that the younger children of the late Mr Hogg, (Mrs Laſhly alone excepted), had renounced their claims of legitim; and on that preſumption the deciſion both of this Court and of the Houſe of Peers proceeded. The judgement of the Court of Seſſion was, "Finding, That the renunciation of the claim of legitim by the younger "children of the deceaſed Mr Hogg, operated in favour of the purſuer Mrs "Rebecca Hogg (Mrs Laſhly), and has the ſame effect as the natural death "of the renouncers would have had: and as ſhe is the only younger child "who did not renounce, find her entitled to the whole legitim, being the one "half of the free perſonal eſtate belonging to her father at the time of his de-"ceaſe, whether ſituated in Scotland or elſewhere." And this was the judgement approved of in the laſt reſort.

Hitherto no appearance had been made for any of the other younger children; but when it had been fixed by an unalterable deciſion, that the younger children of the late Mr Hogg, who had not diſcharged their claims of legitim, were entitled to one half of the moveable eſtate of their father, a claim was made for the truſtees of Alexander Hogg, one of the younger children, whoſe affairs had gone into diſorder; and upon this claim being made, the preſent Mr Hogg of Newliſton brought a multiple-poinding, calling Mrs Laſhly and the truſtees of Alexander to aſcertain their rights to the legitim.

The principal queſtion therefore was, Whether Alexander had diſcharged his claim to legitim by the tranſactions entered into with his father? and whether, if he had not diſcharged it, the truſtees had not, by their conduct, renounced all right to demand it? There was alſo another claim made by Mrs Laſhly, founded on the judgement of the Houſe of Peers, in the event that the claim made by the truſtees ſhould be ſuſtained; for ſhe inſiſted, that the decree in queſtion having ordained the preſent Mr Hogg to pay over to her one half of the moveable eſtate of her father, it was a res judicata which intitled her

her to demand from him that ſum, whatever might be the fate of the claim made by Alexander's truſtees.

To this laſt demand of Mrs Laſhly's Mr Hogg oppoſed the words of the judgement, which ſhowed clearly that it proceeded on this fact, that ſhe was the only younger child who had not diſcharged her legitim; a fact which ſhe had all along maintained, and which had never been inquired into. But if it now appeared that this was a miſtake, and that Alexander, who was no party to the former action, was really in the ſame ſituation with herſelf, and had not diſcharged his claim, the judgement could not affect him, nor deprive him of his ſhare of the legitim: nor, of courſe, could Mr Hogg be liable in more than the one half of the moveables, payable to whoever ſhould be found to have a preferable right thereto: even had the whole been paid to Mrs Laſhly, ſhe muſt have warranted the diſcharge; and that warrandice would have made her liable to the effect of the claim by the truſtees of Alexander.

This claim was rejected by the Court. The other depended on the following circumſtances.

The late Mr Hogg had originally intended the proviſions to his younger children to be L. 1500 Sterling; and, in the 1768, when Alexander was only eighteen years of age, he gave him, on entering into partnerſhip with Mr Cameron of London, L. 1500 as his proviſion, L. 100 which he had received on his account as legacies; and he alſo gave him L. 400 in loan, for which he took his bond. Upon this occaſion Alexander gave his father a diſcharge for the L. 1500, as "the portion beſtowed on me by him;" and it was then underſtood by the father, that Alexander had no farther claim upon him. When Alexander's concern with Mr Cameron terminated, he received from his father a farther loan of L. 2000 Sterling, and within a few months thereafter, on the 1ſt September 1780, he received L. 2000 Sterling more.

On the 30th December 1783, Mr Hogg, who had increaſed the proviſions of his other younger children as his fortune increaſed, executed a deed in favour of Alexander, in which he ſays, "I am reſolved, in lieu of a proviſion of L. 4000 "which I intended to have given to the ſaid Alexander Hogg, to diſcharge "the foreſaid two bonds granted by him to me, for the ſum of L. 2000 each, "&c. and that beſides what ſums of money I may have already given him, "and beſides what proviſion I may hereafter think proper to give or bequeath "him." This deed contains a clauſe diſpenſing with the delivery; and declaring, that it ſhall be in "full of all legitim, dead's part, portion natural, or "bairns part of gear." This deed was never communicated to Alexander during his father's lifetime; on the contrary, when Alexander became bankrupt, the late Mr Hogg, in the 1788, made an affidavit on the debt of L. 4000, and intereſt then due, entered his claim, and received a dividend on it, amounting to L. 818: 1: 4 Sterling.

After the death of old Mr Hogg, the deed, by which he diſcharged the claim of L. 4000, on condition of Alexander's giving up all right to his legitim, &c. was delivered to the truſtees of Alexander, in April 1789; upon which occaſion the truſtees granted a receipt, bearing, that they had received "from "Thomas Hogg, Eſq; of Newliſton, by the hands of John Robertſon writer "in Edinburgh, a diſcharge by Roger Hogg of Newliſton, Eſq; to the ſaid

" Alexander Hogg, his ſon, of which the three preceding pages is an exact " copy." And to this receipt by the truſtees, Alexander ſubjoined an atteſtation in theſe terms : " *London*, 30*th April* 1789. I approve of the above-men- " tioned diſcharge having been delivered to my aſſignees."

From the time that this diſcharge was delivered to the truſtees, no dividend was ſtruck upon the debt due to Mr Hogg, although more than one diſtribution has been made. But no claim was entered by the truſtees, nor any intimation given, that they were not to accept of the diſcharge in full of Alexander's claim, until the deciſion in the Houſe of Lords upon Mrs Laſhly's claim for legitim; that is, not for ſeveral years after the diſcharge had been delivered.

Upon theſe circumſtances the queſtion aroſe, Whether Alexander or his truſtees had diſcharged the claim of legitim? The Lord Ordinary pronounced no judgement on the point, but took the cauſe to report on informations. It was on adviſing the informations for all the parties, that is, for Mrs Laſhly and Alexander's truſtees, as well as for the preſent Mr Hogg, the raiſer of the multiple-poinding, that the following opinions were delivered.

OPINIONS.

B.—The queſtion is, How far the decree is to be held as a res judicata, intitling Mrs Laſhly to ſay, " Come of Alexander's claim what will, you cannot now " go into that queſtion ſo as to narrow my intereſt?" But certainly Mr Hogg can be liable only in once and ſingle payment; and to him it is a matter of no patrimonial concern in what way the money be divided betwixt Mrs Laſhly and Alexander.

When Mrs Laſhly formerly claimed, it was under the character of the only child of the late Mr Hogg who had not diſcharged the claim of legitim; and claiming in that character, the proof of the fact lay on her. She averred the fact to be ſo; and Mr Hogg took it as ſhe ſtated it, and went into the argument on the law of the caſe. But now it turns out that Alexander had not been foriſfamiliated; and if the onus probandi lay upon Mrs Laſhly in the queſtion with Mr Hogg, then, when a third perſon appears who was no party to the former proceedings, and not bound by them, his claim muſt be received, and ſhe can get the better of it only by proving the fact upon which her former plea was maintained. Even had Mrs Laſhly given a diſcharge of her claim, ſhe muſt, upon the warrandice of it, have relieved Mr Hogg from any claim at the inſtance of Alexander; ſo that there is truly no ground for ſuſtaining this plea of Mrs Laſhly's.

Then we come to the nature of Alexander's claim. He got L. 1600 upon a receipt, but he gave no diſcharge. He afterwards borrowed L. 4000 from his father; and of theſe bonds his father grants a diſcharge, provided Alexander ſhould, on his part, renounce all claim of legitim. This diſcharge is ſent up to the truſtees on the bankrupt-eſtate of Alexander, and remains in their poſſeſſion; but I think it would be a hard matter to cut off Alexander's claim upon this circumſtance. Had the heir of the late Mr Hogg made a demand upon the L. 4000 bond, and this diſcharge had been pleaded upon in bar of that demand, then Alexander's claim to legitim muſt have been cut off.

off. But nothing more was done than to make a dividend without ſetting apart any thing for this claim of L. 4000 Sterling.

Upon the whole, then, I think Mr Hogg can be liable only in once and ſingle payment; and that there is nothing to exclude Alexander's claim.

C.—The onus probandi lay on Mrs Laſhly in the queſtion with Mr Hogg; and it was incumbent on her to prove, that all the children were either dead, or had diſcharged their claim of legitim; and the ſame is now neceſſary, when a third party appears who pretends to have a right to a ſhare. I am clear that there was no acceptance of the diſcharge in full of his claim of legitim by Alexander. The truſtees, again, did not ſimply allow the diſcharge to lie in their hands, but they actually divided the funds amongſt the creditors, leaving out Mr Hogg; which they had no right to do but under the diſcharge: At preſent I ſhall give no opinion on the effect of this.

D.—The diſcharge found in the repoſitories of the late Mr Hogg does not enter into my conſideration; but I have great difficulty ariſing from the diſcharge which Alexander granted to his father: He acknowledged to have received L. 1600 as his portion; he calls it his portion: Nor does the matter lie there; for there is a letter from Alexander to his father, which ſhows that he did not conſider himſelf as having a title to demand any thing further.

A.—I am of the opinion which was firſt given: I am clear that there was no diſcharge of Alexander's legitim, either before or after Alexander's death. The diſcharge of the portion, which has been taken notice of, does not defeat the claim; a portion may or may not be received in full of all that the child has a right to demand, ſo that this receipt can have no effect; and the letter only ſhows that he was very well pleaſed to get this money from his father. Had the truſtees made a compromiſe with the preſent Mr Hogg, the younger children had nothing to do with that; but I do not think that the truſtees meant to do any ſuch thing, nor could they with propriety have taken a leſs ſum than the amount of the legitim. In ſtriking the ſecond dividend, they left out the claim competent to Mr Hogg upon the bonds for L. 4000 Sterling; and they did very right; becauſe, in one way or another, there could be no dividend upon them; for either the diſcharge was received, and then there was an end of the claim; or the legitim, to which they were intitled, exceeded the ſum in the bonds, ſo that, in place of Mr Hogg's drawing a dividend, they might have a demand to make upon him.

Alexander was not bound by the proceedings in the proceſs betwixt Mrs Laſhly and Mr Hogg; he is a third party, and his ſtanding aloof in the ſituation of his affairs was highly proper.

E.—My difficulty in this caſe lies in the tranſaction which took place with Mr Robertſon; for in the 1789 there was a receipt granted by the truſtees for the diſcharge, and an acknowledgement by Alexander Hogg, approving of the delivery of the diſcharge; and I own, that when I join to this a dividend made on the ſuppoſition that the debt of L. 4000 was ſopited by this diſcharge, it appears to me to bar the claim of legitim, in terms of that diſcharge. I am clear that Mr Thomas Hogg cannot found on that diſcharge.

O.—This tranſaction does not ſhow that they accepted; they did not declare their option to accept of the diſcharge; but now they have made it, and they repudiate the diſcharge.

A.—

A.—The point of view in which this tranſaction appeared to me was, that at the time of his father's death Alexander had not diſcharged his legitim; and that it was entirely optional to him to have taken the diſcharge, and to have ſaid, I accept of this in full of my legitim; or to have rejected the diſcharge, and claimed his legitim. Now Robertſon goes to London, and he gives the diſcharge into the hands of the truſtees on the bankrupt-eſtate of Alexander; it was their duty to receive that diſcharge; and ſuppoſing the amount of Alexander's ſhare of the legitim to have been L. 3000, they would have ſaid, We make no claim for the legitim? we hold by this diſcharge, which gives us better than our claim, for it extinguiſhes this claim of L. 4000 on the funds. But had Alexander's ſhare amounted to L. 8000 Sterling, could this tranſaction with Robertſon have diſcharged this claim? We might have been of that opinion, perhaps, had there been a trifle betwixt the claim of legitim and the claim diſcharged. But I hold the matter, as it now ſtands, to be entirely open, and that the commiſſioners may claim their full ſhare of Alexander's legitim. There has been no diſcharge of that claim. In Mrs Laſhly's conduct there were many circumſtances which ſeemed to indicate an intention of receiving her proviſion in full of all; and I ſee no reaſon why we ſhould judge of Alexander Hogg's conduct more ſtrictly than we judged of hers.

C.—Had Mrs Laſhly accepted of the bond, it muſt have cut off her claim of legitim: now what was the uſe of putting this diſcharge into the hands of the commiſſioners, or of making Alexander concur? Surely this is a proof, that they thought it neceſſary to make him expreſs his conſent and approbation of what they had done. Robertſon did not ſimply put the deed into the hands of the commiſſioners; but underſtanding that it was a mark of acceptance, he procured the conſent of the creditor himſelf. Had the receipt borne, that the commiſſioners were to take advantage of the diſcharge, could they now have brought forward this claim? Surely not; and as I underſtand the object of the diſcharge was to ſopite the debt againſt Alexander, and that they actually ſtruck a ſecond dividend without ſetting apart any thing for that debt, I hold them to be precluded from claiming the legitim.

The Lords found, That Mr Hogg, the raiſer of the multiple-poinding, was liable in once and ſingle payment only; and found, That Alexander Hogg's claim of legitim was not cut off during the life of his father, nor by what paſſed after his father's death: and therefore ſuſtain the ſaid claim, and remit to the Lord Ordinary.

Againſt this judgement a petition was preſented by Mrs Laſhly, which was refuſed without anſwers.

For Thomas Hogg, Eſq; Mr & Mrs Laſhly, Truſtees of Alex. Hogg, } M. Roſs & W. Honyman, John Clerk, W. Maxwell Moriſon, } Adv. } L. Duff, W. S. Ja. Gibſon, W. S. D. Thomſon, W. S. } Agents.

Lord Dreghorn Ordinary. Sinclair Clerk.

June 5. 1795. Judges Preſent,

Lord PRESIDENT,

Lord JUSTICE-CLERK, Eskgrove, Swinton, | Lord Dreghorn, Polkemmet, Ankerville, | Lord CRAIG, Glenlee.

N° LXVII. RITCHIE and others, Creditors of BROUGH,

AGAINST

JAMES JOLLY, Clerk to the Signet.

THIS is a queſtion of retention, founded on the following circumſtances: Mr Jolly, writer to the ſignet, had been induced to become bound for John Brough builder, in a caſh-account to the Royal Bank, and in a bill for L. 500 to Captain Waugh. In relief of theſe engagements he had received heritable ſecurities; to which, upon the bankruptcy of Brough, objections were ſtated upon the act 1696. Mr Jolly had likewiſe, at the requeſt of Mr Brough, purchaſed for him a lot, No. 2. of the ſtances on the South Bridge, at the price of L. 2200 Sterling, for which Mr Jolly bound himſelf, and, by deſire of Brough, received the rights from the town in his own name. Finding that there was a chance of the objections to the other ſecurities being ſuſtained, Mr Jolly refuſed to give up the right to the houſe built upon the area in queſtion, until he ſhould be relieved of all the engagements he had undertaken for Brough. But deſirous that no impediment might be thrown in the way of a ſale of Brough's ſubjects, and a final ſettlement of his affairs, he agreed to join in the rights to the purchaſers of theſe ſubjects, upon the creditors conſenting that his doing ſo ſhould not affect his claim. Accordingly the houſes were ſold, and he joined in the rights; the price was paid to the truſtees, and a ſum ſet apart for anſwering ſuch demands as Mr Jolly might be found intitled to.

The Court ſuſtained the objections to the heritable ſecurities in favour of Mr Jolly: but with regard to his claim of retention, their Lordſhips "Suſtained "the claim of retention, allowance being made for ſuch expenditure relative "to the ſubject as was incurred poſterior to the 17th January 1788, in con- "ſequence of the reſolution entered into at the meeting of the creditors, of "that date:" And afterwards their Lordſhips adhered to this interlocutor, "In "ſo far as it ſuſtains the claim of retention; reſerving to the parties to be heard, "How far individual tradeſmen, creditors of the ſaid John Brough, have a "right to inſiſt againſt the ſaid Mr Jolly, for payment of work done or mate- "rials furniſhed by them to the ſubjects in queſtion; and alſo reſerving to the "creditors at large, to inſiſt againſt him for repayment of the original pur- "chaſe-money of the area."

Mr Jolly ſtated, 1ſt, That he had always admitted the purchaſe-money of the area to be a preferable debt, forming a deduction out of the price of the ſubjects over which the retention extended. 2d, That he alſo allowed the

ſums expended in the building poſterior to the 17th January 1788; and the only queſtion therefore was, How far Mr Jolly was liable to any perſon who could ſhow that they had furniſhed materials to the work when it was going on under the direction of Brough? This point coming before the Lord Ordinary in conſequence of a remit from the Court, his Lordſhip firſt found, that Mr Jolly was liable to the heirs of Mr Selby the plumber, and to Mr Ritchie the ſlater, for two accounts, amounting to L. 56, on this footing, "That "the obligation come under by Mr Jolly to the town, to build the tenement "in queſtion, was ſo far implemented by the furniſhing of the materials in their "accounts." But the Lord Ordinary afterwards recalled that judgement, and took the cauſe to report on informations.

For the tradeſmen it was contended, that Mr Jolly was proprietor; and as ſuch, liable for the money expended on the property; while, on the other hand, Mr Jolly inſiſted, that he was a truſtee holding an heritable ſubject, of which he could not be denuded without being relieved of the obligations he had come under for the truſter.

On adviſing theſe informations, the following opinions were delivered:

OPINIONS.

B.—I underſtand this to be a claim at the inſtance of the tradeſmen concerned in building the houſe in queſtion, who inſiſt, that Mr Jolly ſhould be liable to them for their claims, whether he has funds of Brough's in his hands or no. And I ſee a great deal has been ſaid to prove that Mr Jolly was proprietor of the ſubject, and, as ſuch, bound to pay what has been laid out upon it.

If Mr Jolly is to be conſidered as proprietor, I am clear that he is intitled to hold the price until he be fully indemnified for what he has advanced to Brough. As to the propoſition, that a proprietor muſt be liable for whatever money has been laid out upon his property, I cannot allow that it holds univerſally; we muſt attend to the nature of the outlay, and its uſe. Theſe tradeſmen, all of them, contracted with Brough; and their claim perſonally lay againſt him alone; therefore I muſt deny that Mr Jolly is liable for theſe claims. We daily ſee tenants bound to build houſes on their farms, and to repair their houſes; now, when theſe people employ workmen to perform theſe operations, can it be maintained that the workmen are to recover from the proprietor of the eſtate? No certainly; they can recover from the tenant only. The ſubject in ſuch caſes may be meliorated, but the maſter is not; for he gets no more than implement of the contract, to which he was entitled: he has gained nothing. In the ſame way, here, whether you conſider Mr Jolly as proprietor or not, he is intitled to retention, and theſe tradeſmen have no claim, but as creditors of Brough? Neither is this money which has been laid out upon the ſubject, to be held as in rem verſam of Mr Jolly, as he is recovering only payment of the money which he advanced to Mr Brough, on the faith of the ſecurity.

C.—I have no doubt of the principle which has been laid down, when it is applied to the caſe of maſter and tenant. But this is not a queſtion of a furniſhing to a tenant; for I underſtand that Mr Brough was the intended proprietor, although the area was purchaſed by Mr Jolly, and remained in his name. Had there been no building, Mr Jolly muſt have had recourſe on this area.

But

But a tenement is erected upon it; and I look upon Mr Brough as the mere agent of Mr Jolly, and that the tradesmen who contributed to erect that building, had a claim both upon Brough and Jolly, and that both of them were bound to them. Were this not the case, it would be contrary to good faith, for Jolly to lie by, and then say, I must draw my debt from the price of this subject He can be in no better situation than Mr Brough; and as Brough could have retained no part of the surplus of the price after paying for the area, but must have paid it to these creditors, neither can Mr Jolly: neither of them can draw the price of the subject, without indemnifying the tradesmen.

D.—These tradesmen have a preferable claim for what they have laid out on the subject; and therefore, if Mr Jolly has any thing in his hands, he must pay it over to them.

A.—First of all you are to take off the price of the area; then the expences of the sale; and after these are deduced, there remains L. 900 Sterling; of which Mr Jolly claims L. 500, which he advanced to Mr Brough on the faith of the security which he held; and this leaves a balance of L. 400 to be divided amongst the other creditors.

E.—What I proceed upon is this, That there was an obligation from the first upon the proprietor of the area to build a house in terms of a plan. This made part of the conditions of the sale: and when the agreement was made for building, I consider it to have been made by Mr Jolly, through the intervention of Brough. I cannot therefore sustain a claim at the instance of Jolly which is to exclude the claims of these workmen.

B.—I remain firmly of my opinion, that these tradesmen can have no preference. I am not going to argue the point: But let me suppose, that before Brough's bankruptcy, he had contracted with tradesmen to erect this tenement; he then comes to Mr Jolly, and asks him, whether he will allow him to sell part of the subject, to pay off these tradespeople? Would not Mr Jolly's answer have been, I have no objection to your selling a part of the subject, provided you leave behind sufficient to answer my claim of retention. Now, Jolly, in place of giving Brough the power of selling, has advanced money to him.

A.—It is my opinion, that Brough is to be considered as the employer of these tradesmen; and that the personal obligation attaches to Brough, not to Jolly, who stood in the double character of trustee and creditor. But then another question occurs, Whether Mr Jolly, in so far as he is locupletior, is liable to the creditors for the subject in his hands? and this point does not seem to have been well argued, at least not sufficiently for so very general and important a question. It is a question which may come in many shapes; as where, for instance, a pledge was rendered more valuable, the Civil law gave the impensa necessaria to the creditor, by whom it had been bestowed. But I shall suppose that the expence, in place of being laid out by the creditor, had been laid out by the debtor, the proprietor of the pledge. He renders the security much more valuable; he builds a house on the ground, I shall suppose, at a time when he is solvent; I apprehend that no claim would lie for the value of that house, which could be preferred to that of the creditor impignorator. There could be no possible claim by the proprietor himself, supposing him to have

have paid the workmen; neither do I think it could afford a claim to the workmen themſelves, ſuppoſing them to be unpaid. In this caſe Brough could have made no claim. The claim at the inſtance of the tradeſmen that he employed is a nice point; it is one upon which I have not a clear opinion, though I rather think that it would not lie.

The law of Scotland knows of no real lien in favour of the perſon making an addition to an heritable ſubject, if we except the caſe where burgage tenements are repaired upon a jedge and warrant. But there is another queſtion, Whether are theſe tradeſmen, or the creditors at large, to draw any ſurplus of the price that may remain after paying the debt for which the ſubject is impledged?

Several caſes were ſtated, to ſhow that there is no claim of hypothecation in the law of Scotland, ſimilar to what was contended for by the tradeſmen: As the caſe of a houſe built on an entailed eſtate, where no claim lies againſt the ſucceeding heir of entail; the caſe of tolls, which are aſſigned as a ſecurity for loans, againſt which no claim will be ſuſtained by thoſe who make the roads; and the common caſe of buildings and repairs upon a ſubject covered by an heritable ſecurity.

E.—Mr Jolly became bound to the town to build this very tenement, and that appears to me to take it out of the rule of the other caſes.

B.—There are creditores hypothecarii known in the law of Scotland, but theſe are none of them. The other ground is, that the outlay was in rem verſam of Mr Jolly. The tradeſmen contracted with Mr Brough, and he was bound to them, come the fund from whom it may. Now, in order to enable Brough to pay theſe labourers, Jolly puts money into his hands: it cannot be ſaid, then, that their labour is in rem verſam; for, ſo far as he claims his ſecurity, he paid money for it to Brough, againſt whom the claim for wages lies. So that, on the whole, I do not think that it is a relevant ground in law to make this a preferable claim, that it was laid out on Mr Jolly's property; and I ſee no proof, that what has been laid out, was in rem verſam of Mr Jolly.

State of the vote: Is Mr Jolly perſonally liable to the claim of the tradeſmen?

Liable,—Lord Eſkgrove, Dreghorn.

Not liable,—Lord Juſtice-Clerk, Swinton, Polkemmet, Ankerville, Craig, Glenlee.

The Lord Preſident was of opinion that he was not.

For the Creditors, T. W. Baird, } Advocates. J. Adamſon, } Agents.
Mr Jolly, D. of Fac. Cullen, } Advocates. Ja. Buchan, W.S. } Agents.

Lord Dreghorn Ordinary. Home Clerk.

June

June 9. 1795. Judges Preſent.

Lord PRESIDENT,

Lord JUSTICE-CLERK,	Lord POLKEMMET,	Lord DUNSINNAN,
ESKGROVE,	MONBODDO,	CRAIG,
SWINTON,	STONEFIELD,	METHVEN,
DREGHORN,	ANKERVILLE,	GLENLEE.

N° LXVIII. Mrs JEAN KERR, Purſuer,

AGAINST

CHRISTIAN KERR REID, Defender.

THIS is a claim of terce out of an entailed eſtate. In the 1789 the purſuer was married to the late Robert Kerr, Eſq; of Hoſelaw; and in the 1792 the marriage was diſſolved by his death, without any ſettlement having been made in favour of his widow. Mr Kerr ſtood infeft, at the time of his death, in the eſtate of Hoſelaw, worth about L. 200 a-year, and which he held under an entail. By a clauſe in this entail, power is given to each of the heirs of tailzie to provide his widow in the annual ſum of 400 merks by way of locality, and paying a proportional part of the public burdens, declaring, "that albeit it ſhall happen any of the heirs of tailzie above ſpecified, to failzie in providing their "wives, conform to the above written reſervation for that effect; yet the ſaid "wives ſhall have no manner of right to the terce, or any other legal proviſion "upon or out of the ſaid lands and eſtate, notwithſtanding any law or practique "to the contrary." The entail was recorded; but it is ſo far defective, that it does not irritate the ſales which may be made, nor the debts that may be contracted, contrary to the conditions of the deed.

Upon the death of Mr Kerr, the purſuer, his widow, demanded an alimentary proviſion from the next heir of entail, the defender in this action. The defender was willing to have given the proviſion of 400 merks in terms of the entail, but the purſuer demanded L. 100 per annum. In this ſhape the queſtion came before the Court; when their Lordſhips, in order to determine the general point, whether the purſuer had a right to the terce, or whether it was excluded by the entail, ordered a hearing in preſence. Mr Solicitor General on the part of the purſuer, and Mr Roſs for the defender, were heard; and this day the following opinions were delivered.

OPINIONS.

C.—The right of the terce is in this country coeval with the feudal law itſelf; and we ſee from the Regiam Majeſtatem, that here it was recogniſed at a very early period; it is therefore from theſe authorities only that we can learn the nature of this claim, not from ſtatute; it is from our common law and from the feudal writers that we diſcover the nature of the terce; and it amounts to this, that when a man was infeft in land at the time of the marriage, the wife, upon his death, acquired right to one third of the rents during her lifetime. There is no ſtatute upon the ſubject earlier than the act 1503, c. 77. at which

time the right ſeems to have been perfectly known and eſtabliſhed. The object of the legiſlature in this law was, that as the claim of terce was often obſtructed, under pretence that there had been no marriage, a right of terce ſhould be given to all widows, who had been habite and repute married to the deceaſed proprietor, reſerving to the heir all grounds of challenge.

It has been ſaid, that the huſband's infeftment is the meaſure of the terce. At firſt, it was the huſband's infeftment, at the time of his marriage, which was the rule; one conſequence of which was, that the huſband could not ſell more than two thirds of his eſtate without the conſent of the wife. But as it often happened that the conqueſt during the marriage was made through the induſtry of the wife, this rule was thought to bear hard on the wife, and, in place of taking the lands as they ſtood at the time of the marriage, they were taken as they ſtood at its diſſolution; the conſequence of this was, to give the huſband a power over the eſtate during the marriage; and, of courſe, an heritable bond or an infeftment in the lands came to exclude the right of terce. But ſo ſtrong, at this day, does this right of terce remain, that no perſonal deeds of any kind can affect it; and Stair tells us, that this right in the wife ſo far reſembles a right of property, that the huſband cannot deprive her of it, by delaying to take infeftment, in order to defeat her right; or by fraudulently giving infeftment to his heir, during his lifetime, for the purpoſe of diveſting himſelf. Theſe circumſtances I mention merely as proofs of the force of this right.

When the law ſtood on its original footing, the wife might have renounced her right; but no voluntary deed of the huſband's could have deprived her of it; nothing but her own conſent could have done ſo: and the queſtion now is this, Whether is it in the power of a third party to convey land in ſuch a manner as to prevent the wife of the fiar from having a right to the terce? I have great doubts whether this was ever attempted prior to the 1685; at leaſt I cannot diſcover that any ſuch attempt had at that time been made; for neither Craig, nor Balfour, nor Stair, put ſuch a caſe, nor do they give us any inſtance of its being attempted by the ſuperior. Yet, had it been underſtood that the terce could have been excluded, in place of being uncommon, it is an excluſion which would have been exceedingly common, and for the following reaſons: So long as wardholding ſubſiſted, the terce excluded the ward, and the widow's third was not affected by it; and even at this day the nonentry is excluded by the terce; ſo that, had it been poſſible, by throwing in a clauſe into the right of an unlimited fiar, to have defeated the right of terce, we ſhould have ſeen ſuch a clauſe in every deed granted by a ſuperior. Can we doubt, that ſuperiors, ſufficiently attentive to their own intereſt, did not know this part of the law; and can we believe, that the ſuperior, had it been poſſible, would not have excluded the terce; and yet I have not been able to diſcover one inſtance of ſuch excluſion prior to the 1685.

At the ſame time, there can be no doubt, that both ſuperior and vaſſal may defeat the terce; they may give a liferent-right, as was done in the caſe of Macnair; for if the huſband be only a liferenter, then there is no terce: But wherever there is a fee, whether it be unlimited or deſcending to one after another, or even an heritable bond, or a wadſet, if the widow can ſubſume

that

that her huſband died laſt veſt and ſeiſed in the fee of the eſtate, ſhe is intitled by law to a right of terce out of the eſtate.

Then comes the act 1681, c. 10. which declares, that any ſpecial proviſion by contract, or by any ſubſequent deed, in favour of the widow, accepted by her, ſhall be held to come in place of the terce, unleſs the right of terce be expreſsly reſerved; and this is the rule at this day.

Mr Roſs ſaid, that the terce was in no better a ſituation than the jus mariti; and that if the one might be excluded, ſo might alſo the other. But they are rights exceedingly different. The jus mariti is a tutorial right, which the huſband poſſeſſes over the effects of the wife; no doubt, it is a right which is productive of advantages to him, for he may ſpend the funds which are under his management: But, on the other hand, he is, by the ſame law which gives him this power, burdened with the debts of the wife, and with the expence of ſupporting the family. The difference between the rights lies principally here, that as a perſon may appoint a tutor to a minor, to whom he has given an eſtate, for the purpoſe of managing that eſtate; in the ſame way, when a third party leaves money to a wife, he may place it under the management of whom he pleaſes, and exclude the huſband's jus mariti; whereas the law itſelf has made the right of terce to depend on the huſband's infeftment: in fact, the law has infefted her alongſt with her huſband in the third of whatever eſtate he holds.

I hold therefore, that the rules of the common law do not juſtify the excluſion of the terce, by throwing in a clauſe into a deed excluding it. Let us ſee then what change has been made by the act 1685. The idea of practitioners and lawyers ſince that time ſeems to have been this, that ſeeing the legiſlature had gratified the great proprietors, by enabling them to ſend down their eſtates to their poſterity free from all debts, they grafted the idea of excluſion on this, that although the act had ſaid nothing in regard to the terce, yet it was not illegal, on the ſame principle, to go farther, and form a clauſe for the purpoſe of excluding the terce and courteſy. This is the origin of the clauſe which we are now to judge of. But the act 1685 has nothing to do with the queſtion: For at the diſtance of no more than four years preceding, that is, in the 1681, the legiſlature had laid down the rule, that a proviſion in a marriage-contract, or which has been accepted of by the wife, excludes the terce: Surely, therefore, if it had been the intention of the legiſlature, by the act 1685, to have enabled a proprietor to exclude the terce, they would have done ſo by an expreſs proviſion, ſince the terce had been ſo very recently under their conſideration.

What then does this act 1685 provide? The words of it are, "That it "ſhall be lawful to his Majeſtie's ſubjects to tailzie their lands with ſuch pro-"viſions and conditions as they ſhall think fit;" but that means either lawful proviſions, proviſions not contrary to the common law, or ſuch proviſions and conditions as are ſpecified in the act itſelf, and not every wild and whimſical condition that may enter into the mind of man. Then the act goes on to prohibit the heir of tailzie from ſelling, annailzieing, diſponing, contracting debt, or doing any deed whereby the eſtate may be appriſed, adjudged, or evicted; and if I can underſtand words, the meaning of this part of the act is, to prevent the effects of voluntary deeds by the heir; and theſe deeds are declared

clared null, not merely by declaring a nullity, but by reſolving the right of the contravening heir. The law, therefore, lays down expreſsly this propoſition, that when a perſon holds the fee of an eſtate, that eſtate is affectable for his debts and deeds. But it was well obſerved by Mr Solicitor General, that all that was done by the huſband in this caſe, was the entering into the marriage; and the effect of that as the foundation of a claim on the eſtate, was not the act of the huſband, but of the law itſelf.

Upon what ground is it, when the entail does no more than prohibit the heir from contracting debts, that he may ſell? Is it not upon this plain ground, that the heir is proprietor and fiar of the eſtate? Accordingly, if the heir ſhould be guilty of high treaſon, the eſtate will be forfeited for him and his children; and the act only enables the heir to hold it without the poſſibility of its being appriſed, adjudged, or evicted. But is the claim of terce of the ſame nature with either of theſe rights? is it of the nature of a claim founded on a diſpoſition, or on an heritable bond? or can you apply the term eviction to a legal right, ariſing to the wife from an act of the law, not of the huſband, and giving not a permanent, but a liferent right to a part of the rents of the eſtate?

Since the date of this act, there has been an attempt to ingraft thoſe clauſes on the entail which are to exclude the terce and courteſy; and I muſt obſerve, what is pretty curious in the caſe before us, that although the entail excludes the terce, it has not excluded the courteſy. This clauſe, then, has been introduced ſince the act 1685; and I can figure its having had this effect, that whenever a woman entered into a marriage with an heir of entail, her friends, in place of truſting her proviſion to the fate of a law-plea, have ſtipulated a certain proviſion, and that proviſion has had the effect of excluding the terce; and it is this which accounts for the queſtion coming before us now for the firſt time. Beſides, when this clauſe was introduced, there were no irritant or reſolutive clauſes by which it could be ſecured; it is therefore clear that the parties have acquieſced only from their having accepted of proviſions.

I am ſurpriſed to find quoted as a precedent for the defender, a deciſion in the caſe of Wiſhart v. Wiſhart, (collected by Bruce.) The circumſtances of the caſe ſeem to have been ſimilar to this; and what is the defence againſt the claim of the widow? It is this: The terce is excluded by a clauſe in the entail. Was it maintained, in anſwer to this, that the terce being founded in the common law, could not be barred by ſuch a clauſe? No: on the contrary, the one party maintains, that the terce is excluded by the entail, and the other party, that the entail not being recorded, is not effectual; and upon this abſurd controverſy they join iſſue, and the whole argument turns upon the effect of the recording. The Court found, that the entail not being recorded, the excluſion was not effectual; and found the widow intitled to her terce. This is the only deciſion, and it is againſt the defender's plea. But the argument which he draws from it is this. The terce was given becauſe the entail had not been recorded: but had it been recorded, the deciſion would have been perfectly the reverſe; and no terce would have been given: and here the entail has been recorded. But this concluſion I deny; you had no occaſion, in that caſe, to decide what would have been the effect of recording; but the deed not being recorded, you found that it could have no effect

and

and you went no further: nor is it uſual for this Court to raiſe up unneceſſarily abſtract points of law for diſcuſſion.

It may be ſaid that this claim of the terce may be attended with great hardſhips in the caſe of great eſtates. But will it not rather have the effect, when that is the caſe, of putting the parties in mind of the neceſſity for preventing this legal incumbrance; and when this ſtep is not taken, I do not think that we will be inclined to rear up arguments in favour of heirs of entail of great eſtates againſt widows. I have heard ſome of your Lordſhips ſay, that you had a favour for entails; but this Court has ſhown no ſuch favour; and there is not one inſtance in which you have not laid hold of every objection to cut them down. You give them fair play, no doubt; for my own part, I have no notion of leſſening the rights of poor widows in favour of heirs of entail.

B.—I do not intend to enter into the hiſtory of the terce, for its origin does not appear to me to have any thing to do with this queſtion. The terce is a proviſion made by law in favour of widows, in virtue of which they have right to the liferent of one third of the rents of thoſe lands in which their huſbands died infeft, after deducing the burdens which may affect theſe lands. I gave great attention to Mr Solicitor's pleading, which was exceedingly ingenious: he told us that this is a new caſe; and I think it is a new caſe. There is a very conſiderable part of the landed property of this country under entail: I have ſeen many entails; and yet I never ſaw any of them that did not exclude the terce; and that is the caſe, not only with entails ſince the act 1685, but with thoſe prior to that act: Therefore, when I ſay that this is a new caſe, it muſt appear to me, that had it been a queſtion attended with any difficulty, it muſt have been the ſubject of inveſtigation before this Court long ago.

The power of making an entail is not founded on the act of parliament; it is founded on the feudal law of Scotland. There were entails in this country before the act 1685. The matter was finally decided in the caſe of Annandale; there it was determined in favour of the heirs of entail; and from that time to this the juſtice of that deciſion has never been called in queſtion. This deciſion gave riſe to many entails of great eſtates before the act 1685; and ſo far was that act from giving a right to make entails, that the meaning of it was this, ſeeing entails are going on, it is neceſſary to curb them; for creditors and ſtrangers may be impoſed on, and materially injured: therefore, where entails are made, they ſhould be attended with certain ſolemnities. Accordingly two records were appointed; the conditions are directed to be put into the inveſtitures of the eſtate, and thence into the ſeiſin, and a new record of entails is created. Theſe regulations affect entails made before, as well as thoſe made after the act. And ſo it was found in a caſe decided in this Court, which was afterwards affirmed in the Houſe of Peers.

It was admitted in the pleading, that the moſt onerous acts and deeds, if they be contrary to the terms of the entail, are not effectual to burden the eſtate. Now the terce ariſes from the act of the law, is of an alimentary nature, and is founded on the natural obligation which the huſband lies under of ſupporting his wife. But I never underſtood that a natural obligation to aliment the wife after the huſband's death, was of a more onerous nature than a debt;

and as the effect of an entail is to defend the heir againſt the debts of his predeceſſor, I cannot conceive how I am to find, that it has not the effect of guarding againſt the leſſer obligations in favour of the wife.

It is very true, the right of terce does not ariſe from the act of the huſband; and it may be the caſe, that when an entail has been made by the huſband after the marriage has been entered into, the right of terce will not be excluded by the entail. But that is very different from the caſe of an eſtate deſcending by an entail executed by another, who may burden it in what way he pleaſes.

There are different rights veſted in the huſband by marriage, as the jus mariti and courteſy; and it appears to me very odd, to ſay that theſe cannot be taken away. I could underſtand it, if any perſon would ſhow me that the taking away theſe by a clauſe in the contract was contra bonos mores: But that is not pretended; and do we not ſee caſes where all theſe rights of the courteſy and jus mariti have been renounced by the huſband; and not only ſo, but grants made by third parties, in which they were expreſsly excluded? At one period it was doubted whether a huſband could have renounced his jus mariti in favour of his wife; but it never was doubted that a third party might have given a proviſion to the wife, excluding this right in the huſband.

Theſe rights, then, are not inſeparable from the parties; for we ſee inſtances of their being all renounced; and if the party himſelf can give them up, multo majus may a third party, when he gives an eſtate, give it under what conditions he thinks proper, and, amongſt others, certainly under the condition, that the huſband ſucceeding ſhall not be at liberty, on his death, to give an aliment to his wife out of it. The aliment of the wife is a natural obligation, no doubt; but it is a natural obligation on the huſband only; it does not affect the third party; and when the huſband is prohibited from alimenting his wife out of the eſtate, he muſt provide for her otherwiſe.

It was ſaid in the pleading, that in order to ſecure an eſtate againſt the claim of terce, irritant and reſolutive clauſes were required: But theſe are neceſſary only to ſave againſt the deeds of the proprietor, not againſt the acts of the law. What are you to annul in excluding the terce? I apprehend, that neither irritant nor reſolutive clauſes are neceſſary for guarding againſt the proviſions of the law; it is enough, that the proprietor, in conveying his property, has qualified the right; that he has made their excluſion a condition of the entail; and this he can do in two words, by ſaying, "I exclude the terce and courteſy."

It has been remarked by the Judge who has delivered his opinion, that if the excluſion of the terce had been in the power of the granter, the act 1685 would have taken notice of it: But when, by the act 1681, the legiſlature thought a proviſion made by the parties ſufficient to exclude the terce, how could they deem it neceſſary to give a power in the act 1685 to exclude it? Upon the whole, I am clear that there is no room for taking any exception to the excluſion of the terce.

D.—The third opinion was in favour of the claim of terce; upon this ground, that the terce did not fall under the expreſſions in the act 1685, and that the exception by a proprietor, was contra bonos mores.

E.—The entail before us excludes every legal proviſion, and impowers the huſband to give a proviſion to his widow of 400 merks, if he chuſes. I have no

occaſion

occaſion to ſay any thing upon the favour due to entails, and whatever my opinion of their expediency or inexpediency may be, I ſhall always give them a ſtrict interpretation. In this caſe, I ſee the maker of the entail, on the ſuppoſition that the entail was effectual, made an excluſion of the terce; but the entail is not good, and even the object of the act 1685 is not attained.

I do not believe that the legiſlature would have allowed the act 1685 to have paſſed without throwing in a clauſe on the terce, had they conceived it to give to a proprietor a power of excluding the terce.

The law has given a reaſonable proviſion to the widow; and I ſhould doubt if the law could give a right to exclude the terce: it would be contra bonos mores. The act 1681 is not recalled by the act 1685, nor is there an expreſſion in the act 1685 that can be applied to the terce. On the whole, I am for the lady.

N.—I ſhall give my opinion very ſhortly. It appears to me, from the nature of the right of terce, that it may be excluded, and has been excluded in this caſe. There is nothing inherent in this right; it is not of the ſame nature with a claim of aliment, for that I think is inherent to marriage; the terce is not. The right of terce does not affect every part of the huſband's eſtate; it does not affect his moveable property; it is excluded, by heritable bonds covering the lands; and if the eſtate is held under limitation, the wife can take under that limitation only. Where the huſband's right, for inſtance, is a mere liferent, ſhe has no claim; or where creditors affect the ſubject, ſhe has no claim; and of courſe, when the eſtate is held under the condition, that the widow ſhall have no terce out of it, ſhe can have none: nor is this attended with any hardſhip, ſince ſhe ſees the nature of the excluſion from the records, and enters into the marriage in the full knowledge of her ſituation.

A.—My opinion coincides with the ſecond which was delivered, and with that which has been juſt now ſo well expreſſed. In judging of this queſtion, I will give my opinion as I would have done in the 1684, had I been then alive and ſitting here; or as if the legiſlature were now to repeal the act 1685; for I think that act is entirely out of the queſtion.

The hiſtory of entails was very well given in the ſecond opinion. For a long time paſt, the right of refuſal in the ſuperior has been circumſcribed, and the proprietor has had the power of conveying his property under what conditions he pleaſes; and the only queſtion that ever has occurred, has turned on the power of excluding creditors or purchaſers; but it never has been doubted, either before or ſince the act 1685, that in queſtions with heirs, the diſponer might add what conditions he choſe.

(The caſe of Stormount ſtated). In that caſe, the opinion was, that the limitations appearing on the records, they were therefore effectual againſt creditors and third parties; and thus ſtood the law down to the 1685. By that act a double regiſtration of the conditions and limitations is required; the object of the act being the ſafety of creditors, without any view to reſtrict the powers of proprietors, farther than the ſafety of creditors rendered it neceſſary; and this was to be attained by the double regiſtration of the entail, ſo as to put both creditors and purchaſers on their guard; and by declaring, that without that double regiſtration the entail ſhould not be binding.

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As to the deciſion in Wiſhart's caſe, collected by Durie, it has been ſaid, that the terce was found to be a good claim, becauſe the entail was not on record. But ſhould that queſtion now occur, I for one ſhould give a contrary opinion; and that brings me to conſider theſe legal claims; for we cannot diſtinguiſh betwixt the terce and the courteſy.

Where theſe proviſions have not been guarded againſt, it is by the act of the law that the eſtate is affected. But is it not admitted, that theſe proviſions are ſubject to the will of the parties; and that, when voluntary proviſions are entered into, they put an end to the legal ones? And this affords clear evidence that every thing in regard to theſe claims muſt depend on circumſtances; and that all that is neceſſary, is to expreſs the intention of the proprietor.

And this brings me to the caſe of the excluſion of the jus mariti, in which I think the Court have gone rather too far; but I mention it merely to remark, that this principle has been recogniſed, that a perſon giving an eſtate may ſay, if you take it, it muſt be under ſuch and ſuch conditions. Is this then an improper one?—No. But it is ſaid, there muſt be irritant and reſolutive clauſes: But ſuch clauſes are inapplicable to the terce; the language of theſe clauſes does not apply to the conditions under which the eſtate is given. Thus in the caſe of the arms: Certain arms are in general required to be uſed; but this condition is not guarded by irritant and reſolutive clauſes, it is a condition, the non compliance with which vacates the right. It is the ſame with the excluſion of the terce and the courteſy; and an irritant clauſe could no more apply to theſe, than to the uſing the arms. In the claim of terce, dies nec cedit nec venit; there are not termini habiles for the irritancy, until the marriage is diſſolved by the death of the huſband; ſo that there an irritant clauſe could have no effect. The entail ſays, that no terce ſhall be given to the wife; which, in ſo many words, is to annul the claim of the wife: and this, I apprehend, a proprietor may do at common law, and not under the act. And no perſon ſucceeding who is called under the entail has a right to complain: for was it not in the power of the granter to give the eſtate under the condition, that the widow of a proprietor ſhould have no claim of terce?

Stair, and all our writers, tell us, that this claim depends on the nature of the eſtate held by the huſband deceaſing. If the eſtate be burdened with debts, there is no claim. If the eſtate be lawfully burdened, there is no claim; and this I apprehend to be allowable; for the proprietor may diſpenſe with this claim: it is a limitation of the heir to a certain extent; and it is of no conſequence whether the limitation be directed againſt the heir ſolely, or againſt his widow alſo; and conſequently here there is no claim. The terce is a right under the public law; but it is one which may be excluded; and ſo is the courteſy. This queſtion, therefore, does not turn on the act 1685; and I am very clearly of the ſecond opinion which was delivered.

O.—Of the opinion firſt delivered.

C.—The want of any one inſtance of an excluſion of the terce in feudal grants, though evidently for the intereſt of the ſuperior, ſhows that he was not underſtood to have a right to exclude the terce; and when the law gave its ſanction to entails, it very evidently did not mean to give a power of excluding

cluding the terce. The right of terce is very different from the husband's jus mariti. But even with regard to it, although there may be good reason for excluding the management of an individual, there can be no reason why you should exclude the right of the husbands of heiresses for a series of ages; and were such an attempt to be made, it would not be effectual, as it would be contrary to the nature of personal property.

State of the vote: Sustain or Repell the claim of terce.

Repell,—Lords Justice-Clerk, Polkemmet, Ankerville, Craig, and Glenlee.

Sustain, Lords Eskgrove, Swinton, Dreghorn, Stonefield.

Carried, Repell the claim.

The Lord President was for repelling the claim.

The question then came to be, Whether the widow was intitled to any aliment, and to what extent?

B.—The entail allows the husband to provide his wife, in case of her surviving him, in 400 merks a-year; and now we are to exercise the power which the husband ought to have exercised; and I have very great doubt whether you can do more than exercise the power of the husband, and supply his omission.

C.—We are not bound by the entail; it does not contain an irritant clause; and so does not tie us down from doing what we may conceive to be proper.

The Court found the widow excluded from her claim of terce by the entail; and found, that the claim of aliment cannot be extended beyond the 400 merks allowed to be settled on widows, but found her entitled to an annuity to that extent.

Against this judgement a reclaiming petition was presented, which was appointed to be answered; on advising which, the Court unanimously adhered to the judgement repelling the claim of terce; but before answers as to the amount of the aliment, ordered a condescendence of the funds and debts.

For the Pursuer, Mr Sol. General and R. Hodshon Kay, } Adv. Ja. Marshall, W. S. } Agents
Defender; Matthew Ross, } Rob. Bruce, }
Inner House. Home Clerk.

N° LXIX. Robert Montgomery of Bogston, Esq;

AGAINST

Alexander Fowles of Roseholm, and James Innes of Warrix, Defenders.

IN the 1722, William Barclay of Warrix executed a disposition in favour of Robert Barclay his son, conveying to him and his heirs whomsoever, the lands of Warrix and others. This disposition contained no power to alter, but was kept in the hands of the father. Robert in the same year went abroad, and settled in South America; but before leaving Britain, he executed an entail in favour of himself and the heirs male of his own body; whom failing, to Alexander Barclay, Esq; In this deed he reserves a power of revocation at any time, ac etiam in articulo mortis.

William, the father, notwithſtanding the terms of his former deed, which contained no power of revocation, and without cancelling that deed, executed a new one, in the 1729, in favour of Robert, and the heirs-male of his body, &c. whom failing, to Jean Barclay and the heirs-male of her body, &c.; and the next day infeftment was taken upon this deed in favour of Robert and Jean Barclay.

Robert, (ignorant, it is ſaid, of the deed 1729), executed, in the 1734, a latter-will, revoking all former deeds, and leaving the liferent of his whole lands and eſtate, wherever ſituated, to his father; and after his father's death, to his ſiſter the ſaid Jean Barclay; and by a ſeparate writing he ſays, "I here- "by declare, that the diſpoſition which I have granted in favour of my ſiſter "Jean Barclay, was made with the real intent that ſhe, the ſaid Jean Barclay, "after my father's and my death, (no lawful heirs of my body ſurviving), "might take quiet poſſeſſion, for her own uſe and her heirs, of all lands and "houſes, tenements, ſum or ſums of money, and all other effects whatſoever, "belonging to me at and before my death. And as I have no lawyer here to "apply to for advice, and to draw ſuch a diſpoſition as might be more valid "to ſecure to my ſaid ſiſter all lands, ſums of money, or other effects whatſo- "ever belonging to me at my death, I thought proper to annex this, that my "deſign and intention by the foreſaid diſpoſition might not be fruſtrated or "prevented by any miſtake, or ignorance of the writer."

This declaration was not holograph of Robert Barclay, nor had it the ſolemnities of the act 1681, nor the forms of deeds executed according to the law of England: and there was ſome doubt whether it referred to the latter-will, or to ſome other deed or diſpoſition which did not now appear.

The will, with this declaration, was tranſmitted to England, and was proved in the prerogative court of Canterbury in the 1737.

Upon the death of Robert a competition aroſe betwixt Alexander Barclay and Jean Barclay. Alexander claimed as heir of entail, under the deed executed by Robert before he left Britain; Jean as infeft on the diſpoſition 1729, and as diſponee under the ſettlement by Robert in the 1734. Alexander's claim was ſaid to be cut off by the revocation in Robert's laſt deed; and Jean's was objected to as being founded on the deed granted by her father in the 1729, after he had diveſted himſelf by the deed 1722; or as founded on Robert's laſt will and codicil in the 1734, which was inſufficient to carry landed property in this country.

The claims of theſe competitors never received a judicial deciſion, but a ſubmiſſion was entered into; the land was divided betwixt them in certain proportions; and on that right they continued to poſſeſs till the 1750, when a new claimant appeared in the perſon of Janet Simpſon, the daughter of Barbara Barclay, another of William's children.

Now William the father's diſpoſition to Robert in the 1722, was to him and his heirs whomſoever; it contained no power of revocation, and was ſtill in exiſtence. If, therefore, Robert's laſt will and codicil were ſufficient to revoke the entail which he executed on leaving Britain, in terms of the power of revocation which that deed contained, then Alexander Barclay's right, which ſtood

upon

upon that title, was at an end. And on the other hand, if Robert's laſt-will and codicil were inſufficient to regulate the ſucceſſion of heritage in this country, then Jean's preferable right was at an end, and there was an opening for the heirs at law of Robert. The heirs at law were, Jean his ſiſter, and this new claimant Janet Simpſon, the daughter of the deceaſed ſiſter: conſequently theſe two were heirs-portioners of Robert.

It was under this title, and upon theſe grounds, that in the 1750 a reduction was brought by Janet Simpſon againſt Barclay, &c. The judgement of Lord Elchies, who was Ordinary, was, That the entail was revoked by the teſtament and codicil annexed; that the teſtament and codicil was no habile conveyance of the heritage in queſtion; and that Janet Simpſon, the purſuer, and the heir of Jean, (for Jean was now dead), the defender, were joint heirs by the deed granted by William, the father, in the 1722.

But the Court, on the 10th December 1751, although they agreed with the Lord Ordinary in finding that the entail was revoked by the teſtament and codicil, yet they found that theſe, though not effectual to convey heritage, were a ſufficient indication of the will of Robert Barclay that his whole eſtate ſhould deſcend to the heirs therein mentioned, and as ſuch afforded a ground of action to the heirs of Jean Barclay againſt the purſuer, as one of the heirs-portioners of Robert, to denude of the ſaid eſtate.

To this judgement the Court adhered; no decree was extracted, and no action was brought againſt Janet Simpſon to make her denude, the heirs of the parties in the ſubmiſſion continuing to hold the lands thereby awarded to their predeceſſors.

The preſent action is brought at the inſtance of Robert Montgomery, for behoof of William Wilſon, the eldeſt ſon of Janet Simpſon, the purſuer in the action 1751, againſt the heirs and repreſentatives of the defenders in that action; ſo that upon the merits the queſtion is the ſame as formerly. But the defenders have now the additional defence of preſcription, which precludes, (as they maintain), the Court from going into the merits.

This plea of preſcription is founded on the diſpoſition 1729; upon which Jean Barclay was infeft, and which has been a title ever ſince; and although the action 1751 might have been an interruption of the preſcription had the queſtion remained undecided; yet having been decided in favour of the defenders, it rather increaſed than diminiſhed the bona fides of the defenders, and is therefore no interruption of the preſcription: Beſides, the decree in the 1751 is a res judicata, which at the diſtance of forty years cannot be overhauled.

OPINIONS.

B.—With regard to the old deciſion, Simpſon againſt Barclay, 11th December 1751, I am very clear that it was ill decided. I am for preſerving the purity of our conveyances, and I have always endeavoured to preſerve it: In this caſe, I can ſee no diſtinction betwixt the will and the codicil; they are both declarations of will, and no more; and I hold it to be an inviolable rule of the feudal law of Scotland, that an eſtate cannot be carried by mere expreſſion of will, there muſt be words de præſenti conveying the lands.

But then, in what way are we to get at the queſtion? How is it to be proved, that the deed 1722 was a delivered evident? It has been averred, that the father

father remained in poſſeſſion till his death; but the deed did not reſerve a life-rent, and it was not in the hands of the diſponee; I think that the father had not delivered his firſt ſettlement, and that he reſerved a power to ſettle his eſtate. When a father makes a ſettlement, and the deed appears in the hands of a third party, the legal preſumption is, that it was put there for the behoof of the father; in the firſt place, that he may call for it at any time; but if it be not called for, then, on the death of the father, it muſt be underſtood to be held for the uſe of the diſponee. Where this deed was we know not. But another queſtion occurs to bar the action. The deed 1729, it is admitted, was delivered, and not revoked; the father gives this right, and infeftment followed on it; why may not the defender plead the poſitive preſcription on that title? for a perſon may have ſeveral titles in his perſon; yet, if he has a charter and ſeiſin, followed by forty years poſſeſſion, he has acquired a right by the poſitive preſcription. I admit that the proceedings in the firſt action were an interruption; but that took place in the 1745, and a ſecond courſe of preſcription has run ſince. Then comes the proceſs 1751; and had it not gone the length of a decree, it would have preſerved the claim for forty years longer: But it came to a judgement. Had that action not been brought, the ſecond courſe of forty years would have been expired before the preſent action was raiſed; and were you to ſay, that there was nothing in the decree, and that the action muſt have the ſame effect, as to the interruption of preſcription, that it would have had, had there been no decree; then, that is juſt to ſay, that I am better, had there been no action at all, than I am with a decree in my favour.

But there has been another anſwer made to this plea; becauſe the judgement has not been extracted, it has been ſaid, that an appeal may ſtill be lodged: But my opinion is, that where a decree has been pronounced, it cannot be appealed from after an acquieſcence of forty years. The purſuers, therefore, although well founded on the merits, have come too late with their challenge.

A.—The deciſion in this caſe has been more founded on, and more tortured and twiſted, than any other deciſion of the Court; and the papers have been printed and re-printed again and again. The truth is, that the parties ſeem to have gone to work in a very ſlovenly manner, without ſo much as knowing whether the deed was holograph or not, or whether it was a regular deed. It is now too late to open up the judgement; but I am pleaſed to have this opportunity of expreſſing my diſſent from it as a deciſion. What could have been more improper than to have revoked a formal ſettlement by a null deed, and then to have found the deed good as to one purpoſe, and bad as to another? On this point, there is an argument in Mr Tait's paper for Mr Coutts, in the queſtion with Crawford; and if there be an argument amounting to a mathematical demonſtration, it is that one. I am ſorry to ſee the judgement of the Lord Ordinary (Elchies) in favour of this diſtinction, for he was a very great man.

As to the other point, that a latter will and teſtament, though not itſelf a ſettlement, may be held to be an obligation to diſpone, there cannot be an opinion more hurtful to the feudal law of Scotland than this opinion, which, founded on this deciſion in the 1751, is conſtantly brought back upon you.

And

And I take this opportunity of saying, that it is a decision which ought to be blotted out, and razed from the records of precedents in this Court.

After explaining the situation of the parties upon the footing of the deeds executed by William the father and Robert the son, this Judge's opinion upon the prescription was, That an action was no interruption of prescription against the defender, when the action was closed by a decree in favour of the defender: and his Lordship was, upon the whole, for assoilzieing. It was further said, That there was a very great mistake in referring, as had been done, to the case of Boyd of Pinkhill; that was the case of a sale, which has no relation to the case of a settlement.

The Court assoilzied from the action.

For the Pursuer, Mat. Ross, } Adv. A. Blair, W. S. }
Defender, D. of Faculty, } Th. Adair, W. S. } Agents.

Lord Dreghorn Ordinary. Home Clerk.

June 10. 1795. Judges Present,

Lord PRESIDENT,

Lord JUSTICE-CLERK,	Lord POLKEMMET,	Lord METHVEN,
ESKGROVE,	ANKERVILLE,	GLENLEE.
SWINTON,	DUNSINNAN,	
DREGHORN,	CRAIG,	

N° LXX. Mrs ELISABETH CRAWFURD, Pursuer,

AGAINST

THOMAS COUTTS, Esq; Banker, and Sir ROBERT CRAWFURD of Jordanhill, Defenders.

THE question at issue betwixt the parties was, Whether a deed executed on deathbed, in virtue of reserved powers to alter in favour of a stranger, contained in a deed executed in liege poustie, be reducible by the heir at law, on the head of deathbed?

The late Colonel Crawfurd was infeft in the lands of Crawfurdland in the 1762. In the 1771, immediately before he went abroad to join his regiment, he executed a disposition and entail, in favour of himself in liferent, and the heirs male of his body; whom failing, to Sir Hugh Crawford of Jordanhill, and the heirs-male of his body; whom failing, to the heirs-male of the body of the deceased William Crawford, merchant in Glasgow; and whom all failing, to his own nearest heirs and assignees, in fee; and this deed contains the following clause: "Providing and declaring, as it is hereby expressly provided "and declared, that notwithstanding the right of fee and property of the lands "above disponed, is hereby conceived and taken in favour of the heirs-male "of my own body, whom failing, to the heirs male of the several other per-"sons before mentioned substituted to them, and that heritably and irredeem-"ably; yet, nevertheless, I do hereby reserve to myself full power and "liberty, at any time of my life, et etiam in articulo mortis, to alter, inno-

" vate, annul, and make void theſe preſents, either in whole or in part, and " to infringe upon, or totally change the foreſaid ſeries of heirs, or courſe and " order of ſucceſſion above deviſed; as alſo to contract debts, &c. and ſell, &c.; " and to do every deed, and exerciſe every act of property, that any unlimited " fiar, by law, can do," &c.

On the 13th February 1793, juſt ſix days before the death of Colonel Crawfurd, he executed a new ſettlement, recalling the former, and giving the eſtate of Crawfurdland to Mr Coutts. The clauſe by which the former deed is recalled, and upon which the queſtion turns, is in theſe terms: " And I " hereby revoke and recall all former diſpoſitions, aſſignations, or other deeds " of a teſtamentary nature, formerly made and granted by me, to whatever " perſon or perſons, preceding the date hereof; and particularly a deed granted by me in the year 1771, ſettling my eſtate upon Sir Hugh Crawford of " Jordanhill, Baronet, and his heirs; and I declare the ſame to be void and " null, ſo far as theſe deeds are conceived in favours of the perſons to whom " they are granted; but to be valid and ſufficient to the extent of the powers " therein reſerved to me, to revoke, alter, or innovate the ſame, to the effect " only of making theſe preſents effectual in favours of the ſaid Thomas Coutts " and his foreſaids."

The heir at law, Mrs Eliſabeth Crawfurd, granted a truſt-bond, for trying the queſtion with the diſponees; and under that title a reduction was brought of the ſettlement 1771, founded on the ſtate of the titles; and of the deed 1793 on the head of deathbed. It was this laſt plea which was at preſent before the Court.

OPINIONS.

B.—In an action on the head of deathbed, there muſt not only be a title in the purſuer to carry on the action, but he muſt have an intereſt in doing ſo. Now, although I wiſh very much to give the eſtate to this lady, yet I am of opinion that ſhe has no intereſt in carrying on the action; for ſuppoſing ſhe were to ſet aſide the deed 1793, it would have no effect, but to give the eſtate to the diſponees under the deed 1771. It has been maintained, that the deathbed deed was good for the purpoſe of revoking the former ſettlement, and ſo opening up the eſtate to the heir at law. But this point was early decided; and we have a deciſion upon it in the caſe of Sir David Cunningham againſt Whitefords, collected by Falconer, 10th June 1748. In that caſe this Court found, that the effect of a clauſe in a deathbed deed revoking a former ſettlement, was to open up the ſucceſſion to the heir, while he was left at liberty to reduce the deed in other reſpects on the plea of deathbed. But when it went to the Houſe of Peers, it was underſtood that the Lord Chancellor held it to be a bad deciſion; and the matter was tranſacted, and a great ſum of money paid to the diſponee. I have always been of the opinion of the Lord Chancellor, that had it been brought to trial in the Houſe of Peers, it muſt have been reverſed; and it has ever ſince been held here to have been an erroneous deciſion. This is a point of law which I have often had occaſion to conſider; and I am clearly of opinion, that neither in law nor reaſon can we hold a deed to be good for the purpoſe of revoking a former ſettlement, at the ſame time that we hold it to be inſufficient for conveying the eſtate which it was meant to regulate.

A man on deathbed may throw all his ſettlements into the fire; and having done ſo, the ſucceſſion to his eſtate muſt ſtand on the rules of law, or on the deeds which he may chooſe to execute. But if he ſhall not deſtroy his former ſettlements, the fair conſtruction is, that he meant, if the new deeds which he was to execute ſhould not ſtand, that the former ſettlements ſhould be effectual; that it is not his meaning to die inteſtate, and give admiſſion to the heir at law. If the new deed cannot have effect, the preſumed will in ſuch caſe is, that he prefers his former diſponee to the heir at law.

I am clear on the general point; and there is leſs reaſon to doubt here, becauſe the revocation goes no farther than to validate the new deed, leaving the former deed, in ſo far as it relates to the power of the deceaſed over the ſubjects, entire: And conſequently, as the heir can have no intereſt to reduce this laſt deed, the effect of which would be to open up the ſucceſſion to the former diſponee, I am for repelling the reaſons of reduction.

C.—When a queſtion occurs betwixt an heir-at-law and a ſtranger, I am happy to bring forward the heir-at-law in preference to the ſtranger; for I am unwilling to paſs the legal line of ſucceſſion. In this caſe I am extremely ſorry to be of the opinion which has been delivered. The caſe of Cunningham againſt Whiteford always appeared to me a very extraordinary one; and to the deciſion which was pronounced by this Court, I could have paid no regard.

I hold, that a deed in favour of an heir, alioquin ſucceſſurus, if not accepted by the heir, although it may contain a clauſe enabling the granter to revoke the deed on deathbed, yet has no effect: but when the deed is granted in favour of a ſtranger, and eſpecially when, as in this caſe, twenty years have intervened between the dates of the two deeds, and during which time had Colonel Crawfurd fallen in the ſervice of his country, this ſtranger muſt have taken up the ſucceſſion, the caſe is very different.

The deed executed by Colonel Crawfurd is dated only ſix days before his death; it is executed in favour of Mr Coutts, who is appointed to take the name of Crawfurd, though there is no perſon who has an intereſt in ſeeing that carried into execution; and the queſtion is, ſhall this laſt deed be held to reduce all former deeds, and yet not take effect ſo far as to convey the eſtate? On the grounds which have been already ſtated, a deed cannot be taken in part and rejected in part; and there is the leſs room for this, that the laſt deed only revokes the former, for the purpoſe of giving effect to the laſt one, which ſatisfies me, that Colonel Crawfurd meant not to favour his heir-at-law, but, in caſe of the failure of the laſt deed, Sir Hugh Crawfurd, the diſponee in the former deed: and therefore, ſeeing there can be no benefit to this lady, ſhe cannot prevail in the reduction.

F.—Much depends on the clauſe of revocation. There are two objects in the deathbed deed: 1ſt, To exclude Sir Hugh Crawfurd and the diſponees under the deed 1771; 2d, To give a preference to Mr Coutt's over the heir at law. The revocation excludes Sir Hugh at all events. But, ſays Colonel Crawfurd, (at leaſt ſo I underſtand the clauſe), "As I may not live ſixty days, "and conſequently as this deed will not be ſufficient to bar the heir at law, I "reſerve the effect of the former deeds, for the purpoſe of validating this new "deed."

" deed." Now what is this but a plain device to defeat the law of deathbed? and if ſo, as that is what no perſon can be allowed to do, therefore I am for ſuſtaining the reaſons of reduction.

D.—The law of deathbed is venerable for its antiquity, and admirable for its good purpoſes, and I ſhould be very unwilling to give it up: but if we admit of the device which has been practiſed in this caſe, what has any man to do but to ſet up a mock diſponee, by naming a perſon who never can have iſſue? I make a ſettlement of this kind; and I keep it in my hands, and under the clauſe authoriſing me to revoke in articulo mortis, I make a ſettlement on deathbed in favour of whom I pleaſe, and ſo defeat the law of deathbed. But I hold it to be impoſſible, by any device, for a perſon on deathbed to convey away his heritage; and if you authoriſe ſuch a ſettlement as this, the heir at law may be materially hurt. Theſe are ſtrong obſervations, at leaſt they affect me ſtrongly; and in this caſe, I think the revocation good, ſo far as regards Sir Hugh Crawfurd; but not effectual to bar the heir: I think the deed may ſtand as to the one effect, though it fall as to the other; and I ſee no intention of ſending the eſtate to Sir Hugh, ſhould the right to Mr Coutts be cut down: I am powerfully ſupported in this opinion, by the effects which a contrary judgement muſt have on the intereſt of the heir at law.

E.—I confeſs I am for deciding in favour of the heir at law. It is admitted, that, where there is a diſpoſition in favour of the heir, and a reſerved power of defeating the deed on deathbed, that the deed executed on deathbed is not good. I remember being preſent when the caſe of Rowan was decided; when it was ſaid, by Lord Auchinleck, that if the deed was ſuſtained, there was nothing to hinder any perſon from evading the law of deathbed; he had only to convey the eſtate to the Great Mogul, reſerving a power to alter, and that reſerved power he might alter when he choſe. Were I to attempt to preſerve the power of diſpoſing of my property on deathbed, I would convey the eſtate to truſtees. But be in that what there may, the queſtion here is, whether can the heir ſet aſide the deed 1793? It is ſaid that he cannot do that, becauſe were he to ſet aſide the deed 1793, the diſponees under the former deeds would come in. I ſhall ſuppoſe that a diſpoſition is made in favour of A, with a power of revoking; a revocation is made, when a ſecond ſettlement is executed: but the revocation is ſaid to be made ſub modo, and for the ſole purpoſe of giving effect to the laſt deed. I cannot follow this preſumption:—If there be a revocation of the former deed, then A's right is at an end; and the queſtion remains, Whether you will ſtrain the matter againſt the heir at law? There my difficulty lies: For had Colonel Crawfurd been told that the deed he was executing could not receive effect; and had he been aſked, whether he wiſhed to give the eſtate to Sir Hugh Crawfurd or to his heir at law? I do not think that he would have preferred Sir Hugh; and I ſee no reaſon why we ſhould ſo conſtrue his revocation.

C.—Where a truſt-deed has been executed in liege pouſtie, reſerving power to declare the purpoſes of the truſt, and theſe have been declared by a latter-will, this has been ſaid to be a device for defeating the law of deathbed, and a reduction of it has been attempted; but you found the purpoſes validly declared: and that deciſion was affirmed in the Houſe of Peers. The deciſion

went

went upon this ground, that the truſt-deed had been granted in liege pouſtie.

N.—There has been already much ſaid upon this queſtion, and I ſhall only ſay, that my opinion agrees with that which was firſt delivered. I am not at all moved by any apprehenſion that the deciſion which we ſhall pronounce will affect the law of deathbed. If there be any danger, it is rather that no deed be executed; but when it is executed, we may be aſſured that it will be in favour of the perſon to whom the proprietor means it to go: in this caſe we have very ſatisfactory evidence that this was the caſe with the firſt deed executed by Colonel Crawfurd; and therefore, in my opinion, the heir-at-law has no intereſt to carry on this action.

A.—I had not a doubt upon this queſtion until I heard the opinions which have been delivered by ſome of your Lordſhips; it is a point which I thought had been ſettled long ago. When there is a diſpoſition to the heir-at-law, or heir alioquin ſucceſſurus, I underſtand it to be a clear propoſition, that the proprietor cannot, by any act of his own, diſpenſe with the law of deathbed; which this, in fact, would be, were we to ſuſtain a deed excluding the heir. But I ſhall ſuppoſe that the proprietor ſettles his eſtate on a ſtranger, and adds to the ſettlement a power of altering: the ſtranger muſt receive the diſpoſition under ſuch conditions as the granter pleaſes to annex; and he has no reaſon to complain when the reſerved power is exerciſed. And with regard to the heir, as the ſame deed which recalls the former diſpoſition gives the eſtate to a new ſet of heirs, he cannot complain, as he cannot both approbate and reprobate the ſame deed. It is therefore a point perfectly underſtood, that a proprietor having executed a ſettlement under theſe circumſtances, he may exerciſe the faculty which he has reſerved in the laſt moment of his life, the heir at law being rejected by the old deed, and the former diſponee by the condition under which the right was granted. This point was fixed in the caſe of Douglas againſt Douglas, decided in the 1670; and the firſt queſtion here is, Whether has the purſuer any intereſt to carry on this reduction? It is evident ſhe has none; for could ſhe prevail in ſetting aſide this laſt deed, the only effect of that would be, to make the eſtate go to the former diſponee.

It is ſaid, that this is a way of evading the law of deathbed: — ſo it is; and it has been followed in practice for that very purpoſe; more eſpecially by Engliſhmen, who, conſiſtently with their own laws, wiſh to preſerve a power of diſpoſing of their eſtates to the laſt day of their lives. Were you now to alter the law which has been long held to ſtand in this way, and upon which many ſettlements have been executed, you would produce the greateſt confuſion. When an Engliſhman intends to lay out money in this country, and is deſirous of knowing in what way he can moſt completely keep the command of it, he is directed to execute a truſt-deed; but not a mere truſt-deed in favour of the heir at law, for if that were the nature of the truſt, it would be in no better ſituation than a diſpoſition in favour of the heir himſelf. And here in paſſing I may obſerve, that the difficulty in Auchterlony's caſe was, that it was a deed for uſes and purpoſes to be declared; it was not underſtood to be of any conſequence whether they were declared in the form of a diſpoſition or not: you were of opinion, that any declaration of uſes and pur-

poſes, when probative, was good; even a miſſive letter, I remember, it was ſaid, would be ſufficient: — but the declaration was beyond the ſixty days; and I rather ſuſpect, that had that not been the caſe, the deciſion would have been different. To proceed then with the form of ſecuring the Engliſh property, the ſubject is given in truſt, or if not given in truſt, he is directed to ſettle it on ſome perſon not alioquin ſucceſſurus, reſerving to himſelf a power of altering; and under that title it is underſtood that the proprietor has a power over the ſubject to the laſt. This is the general practice.

It was upon theſe principles that you decided the caſes of Lord Forbes and Pringle of Crichton, where there was conſiderably more difficulty, becauſe the proviſions were in favour of heirs; but the heir found it convenient to take the deed, and having approved, you would not allow him to reprobate.

This leads me to the circumſtances of the preſent caſe. The firſt ſettlement was in favour of Sir Hugh Crawfurd; the deed contained a faculty to alter it even on deathbed; and I can have no doubt, that when a new deed is made under ſuch a faculty, the heir is not at liberty to challenge the deed. With reſpect to this clauſe, you found, in the old caſe of Simpſon and Barclay, that ſuch a clauſe as we have here had the effect of reſtoring the heir: But you have ſince found that that deciſion was erroneous; and I am happy to declare it as my opinion, that it ought not to be conſidered as a deciſion of this Court.

A clauſe of revocation is part of the deed, and from its nature conditional: the meaning of the clauſe of revocation, in this caſe, is, that the granter recalls the former deed, for the purpoſe of giving effect to this. Were it otherwiſe, and had the granter, in all events, meant to defeat all former deeds, why ſhould he not have done it in a ſeparate deed? though perhaps it might be done even in the deed itſelf: But if the granter does not take care of this, we cannot give it effect. In every caſe that has occurred, you have gone on the principles which I have explained. In Rowan's caſe, it was ſaid that the Court were divided; but it was Lord Coalſton only that doubted, the reſt of the Judges were clear: the reporter, it is true, ſays, that in pronouncing that judgement, "the Court were moved chiefly by the want of an expreſs revocation in the laſt deed." But I cannot be of that opinion; for you muſt take the deed altogether, or lay it aſide altogether.

It is ſaid that the deed 1771 did not exclude Mrs Crawfurd. But there is not much in this; for although ſhe might have come in under the laſt deſtination to heirs whomſoever; yet Sir Hugh Crawfurd might have ſold. Her right was on the general clauſe, by which the deſtination is cloſed, and that is never regarded more than where the heir happens to be overlooked altogether.

State of the vote: Suſtain or Repell the reaſons of reduction. — SUSTAIN, Lords Swinton, Dreghorn, Polkemmet.—REPELL, Lords Juſtice-Clerk, Eſkgrove, Ankerville, Dunſinnan, Craig, Glenlee.—The Lord Preſident was for repelling.

The Court repel the reaſons of reduction, in ſo far as they reſpect the lands of Crawfurdland, &c. contained in the diſpoſition by Colonel Crawfurd to Thomas Coutts, of date 15th February 1793, aſſoilzie the defender, and decern.

Againſt

Againſt this judgement a reclaiming petition was preſented, which being appointed to be anſwered, came to be adviſed on the 17th November 1795, when the Court adhered.

For the Purſuers, Ro. Craigie, Wm. Tait, } Adv. J. Beveridge, A. Walker, } Agents.
Defender,

Lord Stonefield Reporter. Sinclair Clerk.

N° LXXI. The Truſtee and Executor of WILLIAM CRICHTON, Eſq;

AGAINST

ALEXANDER CRICHTON Coachmaker, and his Creditors.

THE late Alderman Crichton was proprietor of one half of the lands of Newington, in which he ſtood infeft; and in the 1774 he executed a ſettlement of his affairs in the Engliſh form. In this deed, he ordered his eſtates to be diſpoſed of, and turned into money: and ſays, "For this purpoſe, "I give all my real eſtates in Scotland, to my brother Alexander Crichton "of Edinburgh, and his heirs, in truſt, to be ſold, together or in parcels, for "the beſt price or prices he or they can reaſonably get for the ſame," &c.

Alexander Crichton refuſed to accept under the truſt-deed, and made up a title to the ſubjects in his own perſon, as neareſt heir of Alderman Crichton, over which he gave heritable ſecurities to his creditors.

The truſtee and executor in London had advanced L. 1600 for a commiſſion to Mr Crichton's ſon; and in ſettling that debt he gave Mr Crichton credit for the legacy of L. 500, in an account entered in his books, to which Mr Crichton made no objection at the time.

The queſtions betwixt theſe parties were, Whether the lands were conveyed by the will executed in the Engliſh form? and if not, whether the defender was bound to fulfil the will of Alderman Crichton, in conſequence of his having accepted of the legacy of L. 500 Sterling. The cauſe was reported by Lord Dreghorn on informations.

B.—As to the general queſtion, it is unneceſſary to ſay more, than that it is not ſufficient to ſupport the purſuer's plea; and the other plea, of approbate and reprobate, is not ſupported by the fact. This is not a claim at the inſtance of the heir demanding the heritage, after he had approved of the will by taking the legacy. On the contrary, Mr Crichton, from the firſt, rejected the will; and in oppoſition to it, he made up titles to the ſubjects; and theſe are now conveyed to the truſtee for his creditors If the L. 500 has been paid to him, he may be liable for it to the purſuer; or the purſuer may perhaps have a claim againſt the ſon. But I am clear that Mr Crichton reprobated the will.

The reſt of the Judges were unanimouſly of the ſame opinion.

The Court aſſoilzied the defender; and to this judgement their Lordſhips adhered, remitting to the Lord Ordinary the queſtion as to the legacy.

For the Purſuer, Allan Maconochie, } Adv. Jo. Campbell, W. S. Jo. M'Farquhar, W. S. } Agents.
Defender,

Lord Dreghorn Ordinary. Menzies Clerk.

June 16. 1795. Judges Preſent,

Lord PRESIDENT,

Lord JUSTICE-CLERK,	Lord POLKEMMET,	Lord CRAIG,
ESKGROVE,	STONEFIELD,	METHVEN,
SWINTON,	ANKERVILLE,	GLENLEE.
DREGHORN,	DUNSINNAN,	

N° LXXII. Petition for THOMAS MITCHELL, in Penpont, &c.

THE petitioners were charged for payment of a bill for L. 33, written on a ſix-penny, in place of a nine-penny ſtamp, as the act 31ſt Geo. III. c. 25. requires: On this, amongſt other grounds, they founded their defence; when the charger was ordered to ſtamp his bill anew, which occaſioned an expence of L. 11 Sterling. This ſum the Lord Ordinary found to be a part of the expence claimable from the debtor, and it was againſt this judgement that the preſent petition was preſented. But the Court, founding on the former act, by which a much higher penalty had been impoſed equally on the drawer and acceptor, and in place of which it was underſtood that this modification of it had come, laid the burden equally on both; and this, although it was argued for the charger, that he had been impoſed on by the acceptor, who had known of the defect at the time he ſigned the bill, which was proved by his ſtating the fact as a ground of ſuſpenſion, although he had then had no opportunity of ſeeing the bill, from the time of its being accepted.

For the Petitioner, David Cathcart Adv. J. Dickſon, W. S. Agent.

Lord Ankerville Ordinary. Menzies Clerk.

N° LXXIII. Mr and Mrs LASHLY, Purſuers,

AGAINST

THOMAS HOGG, Eſq; of Newliſton, Defender.

THE point in diſpute betwixt the parties in this cauſe was, Whether the purſuer, as her mother's executor, had a right to one third of the goods in communion, at the time of the diſſolution of the marriage, by her mother's death. As a preliminary point, it was fixed by the deciſion in the caſe, N° 65. of this collection, that at the diſſolution of the marriage the late Mr Hogg was domiciled in this country; and with this fact aſcertained, counſel were now heard upon the reſerved points of the cauſe; the nature of the purſuers claim, and the effect which the marriage-ſettlement executed in the Engliſh form, and the circumſtance of the marriage having been contracted in England, might have upon the queſtion. The Court this day delivered their opinions on the point.

The circumſtances neceſſary for underſtanding theſe opinions ſhall be ſhortly ſtated: Mr Hogg, who had gone early in life to London, was ſettled in buſi-

neſs

neſs there, in the 1737, when he married Miſs Miſſing, with whom he received a fortune of L. 3500 Sterling. The marriage-ſettlement was executed previous to the marriage, and in the Engliſh form. By it, Mr Hogg became bound to employ L. 2500 of his wife's fortune, or ſo much more as ſhould be neceſſary, to purchaſe an eſtate in inheritance of the yearly value of L. 100 Sterling, in any county of England; and to convey the eſtate to truſtees, for his own uſe during his natural life, and upon his death, for the uſe and behoof of his intended wife during her natural life; and after the death of Mr and Mrs Hogg, for the uſe and behoof of their children, and for ſuch other purpoſes as Mrs Hogg ſhould appoint; and failing of any ſuch appointment, for behoof of the children equally; and failing them, to the heirs and aſſignees of Mrs Hogg.

An eſtate was purchaſed in England in terms of this contract, over which Mrs Hogg's annuity, in caſe of her ſurviving her huſband, was ſecured; and it was ſaid, that, in terms of her reſerved power, ſhe had actually diſpoſed of it to the defender, the preſent Thomas Hogg, Eſq; though the other party denied that they had proper evidence of this fact.

It was in the 1737 that this marriage was entered into, at a time when Mr Hogg was carrying on buſineſs as a merchant in London; and it was diſſolved by the death of Mrs Hogg in the 1760; at which time Mr Hogg had retired to the eſtate of Newliſton, which he had purchaſed in Scotland; and where, by the judgement of the Court, it has been found that he was then domiciled. It was upon theſe facts that the cauſe came to be decided.

OPINIONS.

C.—It is agreed on all hands, that the claim of the purſuer for one third of the goods in communion would be well founded, were the queſtion to be decided by the law of Scotland; and a great deal has been ſaid, and much difficulty ariſes, upon the ſimilarity of the preſent claim to the claim of legitim. As you found in that caſe, that the effect of the law of the domicil was to regulate all the perſonal eſtate of Mr Hogg, wherever ſituated; it has been urged, that the ſame effect muſt follow here. But although it may be difficult, yet I think it poſſible to draw a diſtinction betwixt the two caſes, founded on the rights betwixt huſband and wife; for in ſuch a queſtion, the law of the domicil, at the time of entering into the marriage, ought to regulate their intereſts. I do not ſpeak of the domicil when parties are in tranſitu, as in Gretna-Green marriages; but of marriages ſuch as the preſent, where the parties were ſettled in a country, reſiding there, and domiciled there. I think if the parties had made no contract for themſelves, it would then have been neceſſary for us to have conſidered what the nature is of the preſumed contract that the parties have entered into. It has been ſaid, that the law of the domicil regulates inteſtate ſucceſſion, from the preſumed will of the deceaſed; and it is a juſt preſumption. But there is no reaſon why that law ſhould receive effect in regard to ſucceſſion, more than in the rights of parties ariſing from marriage. When a native of this country, domiciled in London, marries an Engliſh-woman without a ſettlement, the preſumption is, that the proviſions are to be regulated by the law of England, rather than by the law of Scotland, which one of them knew nothing of; or than by the law of a foreign country, which neither of them knew any thing of. In this caſe, I do not ſee any ground

why either of the parties ſhould have looked to the law of Scotland for regulating their rights; and on the very ſame principle by which inteſtate ſucceſſion is to be regulated by the law of the domicil, I think the law of England ſhould be followed in deciding this caſe.

It has been ſaid, that when marriage is entered into in a foreign country, it may be impoſſible to diſcover the rules by which the rights of parties are to be fixed; and no doubt, when the caſe occurs, it may be difficult: But here we know the law of England, and we are certain, that the right to the goods in communion, claimed by the purſuer, is not acknowledged by that law; and we have no occaſion to go further into the queſtion, and to enquire into the diviſion of the huſband's property by that law. Had the law of Scotland been the rule, I ſhould have doubted whether the claim would have been competent in the face of the contract which was entered into. This is a claim of joint property; and as it is not received in the law of England, I think it is ill founded.

B.—This is a very important queſtion. In conſidering it, it is not neceſſary to diſcuſs the law of Scotland previous to the act 1681; for whether that act was declaratory, or meant only as enacting from thenceforward, it is now clear, that wherever there is a conventional proviſion, the terce is excluded; but if the contract is ſilent as to the claim of jus relictæ, that claim takes place. It is true, that in ſome caſes the claim of the jus relictæ has been barred, where the intention of barring it has been indicated only; where, for inſtance, the whole claims of the parties appear evidently to have been in view, and provided for. I therefore hold this to be the general rule, that where the jus relictæ is not barred by expreſs words or by implication, it is not barred from the circumſtance of a proviſion having been made in favour of the wife.

There is another caſe, where the parties enter into marriage without a contract: but that point we have no occaſion at preſent to conſider; and when it comes, I ſhall judge of it in the beſt way I can. The queſtion here is not, what Mrs Hogg would have been intitled to without a marriage-contract; but what ſhe would have been intitled to in this caſe, where a marriage-contract was made for the very purpoſe of ſecuring a proviſion for her. No doubt, in marriage-contracts there are obligations implied as well as expreſſed, and both muſt be in the view of parties. But it is unneceſſary for me to look into authorities. The Attorney-General, I ſee, gives an opinion the one way, and the other counſel the other. But we have no occaſion to decide betwixt them: For if the Attorney-General's opinion be good, then, by the contract, Mrs Hogg had right to L. 100 per ann. and to her dower. Now, if the rights of parties be eſtabliſhed by an onerous contract, and if the obligations of that contract are defined, whether expreſſed or implied, it appears to me, that the contract muſt regulate the claims, and the deciſion on it be the ſame, purſue on it where you pleaſe, whatever the law of the country may be where the contract is put into ſuit, whether England or Scotland: it is not a claim on legal rights, it is a claim on an onerous contract entered into prior to marriage.

The firſt queſtion then, in judging of the rights of theſe parties, is this: By the law of which country are you to decide? for in regard to the claim of the purſuer,

the

the law of England and of Scotland are different. Now, for my part, when I conſider that Mr Hogg was a London merchant, that he married an Engliſh lady, had at that time no view of returning to Scotland, on the contrary, that his purpoſe was to ſettle in England, I am of opinion that the law of England muſt regulate this queſtion: for it would be very odd, to allow that the rights of parties are regulated by this contract, and to admit, at the ſame time, that they may be varied by the parties going into another country: and there is the greater reaſon why the rights of the marriage-contract ſhould not vary from ſuch a change, when you conſider, that the huſband has it in his power to carry the party along with him, wherever he may find it moſt convenient. It would indeed ſound very odd to me, to ſay that this contract muſt have been judged of by the law of England, while the parties remained in England; but that now, by their coming to this country, their rights were to change, and to be judged of by the law of Scotland.

I ſhall put the caſe, that Mr Hogg had been a great proprietor in England; that he had been poſſeſſed of an eſtate there of L. 2000 a-year; and had poſſeſſed a ſmall villa in Scotland, yielding L. 50 a-year: that he retires to this country to reſide, where he dies. His widow would, by our law, be intitled to the terce of this ſmall property, and to no more. Would ſhe not then be intitled to ſay, The marriage was entered into with no views of the proviſions given by the law of Scotland; my friends and I treated on the footing of the Engliſh law; and I have been brought down here, without any intention on my part to alter the rights which I conceive the law of England to have given me: why then decide by any other law than that under which the contract was entered into? I cannot conceive that any Court would liſten to a contrary plea, and put off this lady with the proviſions of our law; and this convinces me of the propriety of regulating this queſtion by the law of England; nor can I allow change of place to make any alteration on the nature of the agreement.

I do not know what the rule of the Engliſh law is with regard to the diſſolution of the marriage within year and day without a living child: But I ſhall ſuppoſe Mrs Hogg to have come down to this country, and that the marriage had been diſſolved here within that time; ought the widow's claims to have been judged of by the law of Scotland? I ſhould have thought it highly improper. In juſtice, they could be judged of only by the law of the place where the parties were reſiding at the time of entering into the marriage, and where they meant to remain. The law of England muſt have been the rule; and it would be very odd if a different deciſion could be given. It would be contrary to law and juſtice, and to the law of nations, which gives execution according to the forms of the particular ſtate, but in all according to the terms of the contract.

Suppoſe Mrs Hogg had ſurvived Mr Hogg, ſhe would have had her terce out of Newliſton; but that would have been, becauſe the claim is conſiſtent with the principles of the law of England.

It has been ſaid, that the nature of the preſent claim is explained by the plea of legitim; but this does not affect me. The marriage-contract is an onerous one, and it is intended to ſettle the rights of the widow, but not to regulate the ſucceſſion to the eſtate of the huſband. In the preſent caſe, the

contract

contract ſettled what was to become of the L. 3500 of portion received with Mrs Hogg; but it was not a general ſettlement of Mr Hogg's eſtate. The legitim, on the other hand, is a right of ſucceſſion, though it muſt be liable for the onerous debts and deeds of the father. It has been ſaid, that the legitim tranſmits without a title. But this requires explanation; for were the father to transfer every thing to one child, he could not deprive the other children of their legitim; yet they would only have a jus crediti againſt the child on whom every thing had been ſettled. It is true, their ſhares paſs without a ſettlement: But ſuppoſe the father to have given no right to any of his children, none of them could claim their legitim from their father's debtor, without having made up a title to the ground of debt. And this jus relictæ is a right unknown in England: it is one I do not like: I wonder the act 1681 did not cut it off; and the only reaſon we can conceive why it did not ſhare the ſame fate with the terce, is, that at that time the jus relictæ was, from the ſtate of property in this country, a claim of very little value: But had that act been made in ſuch times as theſe, this is a claim which would have been cut off. I cannot conceive a harder caſe, than where a merchant acquiring and dying poſſeſſed of a great property, and leaving a family of children, ſhould have one third of that property carried off by the wife. I am of the opinion which has been delivered.

N.—I am very clearly of the opinion given.

D.—There is one maxim of law and of common ſenſe, that when a man and woman marry, they muſt take each other for better for worſe; and ſhe muſt follow and ſubmit to the law of the country to which he goes; ſhe muſt ſubmit to him; there is but one will betwixt them. By moving from England to Scotland, it appears to me to be the meaning of parties, to ſubmit to the diſadvantages, and to reap all the benefits that can be derived from the change. A contrary opinion would lead to difficulties paſt deſcription. Had there been no contract, the wife would have had a right to her jus relictæ, terce, and other legal proviſions. There is no doubt of it. What difference then does the contract make? I admit, that, if the contract had been meant to regulate every thing, there would have been an end of the queſtion. But if there be nothing laid down there that can decide the queſtion, what have we to look to? To the law of the country whence they came? No; they have given that up: it is to the law of that country to which they have come, that we muſt look. Now, what would have been the effect of the Engliſh contract, judged of by the law of Scotland? Upon the act 1681, this contract would have excluded her from all right of terce. But as to the jus relictæ, I allow that the claim is affected by circumſtances; but here there is nothing to ſhow that the jus relictæ had ever been in the view of the parties.

I ſhall ſuppoſe a marriage-contract entered into in England, and the parties come to Scotland, where a large fortune is made by the induſtry of the wife; would it not be hard to ſay, that becauſe, by the law of England, the widow could have drawn no part of this fortune, therefore ſhe can have no part of it here, though by our law ſhe would have been intitled to one half of it? I cannot, for my part, clear up my own ideas on this point, without reſorting to the law of this country as the rule for deciding the point.

A.—

A.—This marriage was diſſolved in the 1760, more than thirty years before the commencement of this action; and the action is now raiſed by the children: and this is a circumſtance that ought to be attended to, becauſe the children continued to live with their father after the claim was competent to them; and I ſhould have thought that Mrs Laſhley ought then to have made it effectual. But it has been ſaid, that Mrs Laſhley received money from her father, which kept her ſilent. Theſe circumſtances, were it neceſſary to go into them, would be material in this cauſe; for you will recollect a caſe of Tod and Inglis of the ſame nature with the preſent; it is a caſe decided about twenty years ago; where, although the negative preſcription had not run, yet the ſucceſſion had opened at a great diſtance of time; and there you went on this preſumption, that when parties go on, as in the preſent caſe, you preſume that the original parties had ſettled, and you would not entertain the claims at ſuch a diſtance of time But we have no occaſion to go into this; for I am of opinion, that without it there is no room for the claim, whether we decide by the law of Scotland or of England.

The judge who ſpoke laſt ſeemed to miſtake the nature of the contract; he imagined that it had ſaid nothing of the perſonal effects; but that is a miſtake; for although Mr Hogg had little, the lady had L. 3500, and the articles ſhow where it was lodged, and what the nature of the eſtate was; that it conſiſted of Bank ſtock, ready money, &c. and had the articles not been entered into, this, which ſeems to have been the whole money betwixt them at the time, would have become the huſband's, and he might immediately have got the ſtock transferred in his own name: Now, in that ſituation, a fair and regular bargain is made; the lady's friends ſay, Here is L. 3500 belonging to you; let L. 2500 be conveyed to truſtees, that this lady may have a right to the intereſt of it, and a power of diſpoſal of it: this was done, and ſhe actually diſpoſed of it. Now as to the claim of the jus relictæ, in the event of her predeceaſing her huſband; if ſhe diſpones, then the diſponees, if not her children, may take it; and what is this contract, but ſaying in as many words, without caring for any other law, Here is the rule of our diviſion, I take one thouſand pounds, and the reſt goes to you and your children; and this is preciſely what the jus relictæ would have given. Had there been no contract, I ſhould have had doubts from the caſes ſtated in the pleading; but I think, if a huſband and wife take up a permanent reſidence in a country, they muſt be regulated by the law of that country. But this is not a caſe that admits of the general rules of law; it is the caſe of a contract making a fair diviſion of the property, and for the purpoſe of preventing the huſband from diſpoſing of the wife's fortune; and, from the nature and import of ſuch a tranſaction, I think there cannot be the ſmalleſt ground for ſuch a claim in England. But let us ſee if there be any difference when the claim is made in Scotland. If there had been no marriage-articles, there would have been a claim competent to the heirs of the wife for her ſhare of the goods in communion But ſuppoſing the contract in queſtion to have been entered into here, it would have been ſimilar to the caſe of Mackinnon and Macdonald. I have no objection to the general rule of the act 1681; but that has been ſo modified by the deciſions of the Court, that it is no rule at all: If an annuity or jointure be given over an heritable eſtate, I am willing to

admit the general rule; but where, as in Mackinnon's caſe, there are proviſions given to the wife out of the moveable eſtate, can I allow her to take proviſions out of the moveables under the contract, and by the public law alſo? It is impoſſible. Every caſe muſt depend on its own circumſtances; and this contract regulates the moveable eſtate of the parties; for whatever is given her, I conſider as given from the moveable eſtate, although theſe moveables were ordered to be converted into landed property. In ſhort, it appears to me, that this lady, and her neareſt of kin, have had their ſhare of the moveables under the contract; and if ſo, they cannot claim the legal proviſions alſo: So that, whether we are to decide by the law of England or of Scotland, it is equally clear to me that there is no claim.

If this contract, founded on in England, would have given Mrs Hogg her dower, ſhe may, in like manner, have claimed her terce here. But the claim of terce is in a different ſituation from a claim founded on the perſonal funds.

The Court repelled the claim, with the exception of Lord Swinton, who was for ſuſtaining it.

The judgement was in theſe words: "Find, That the purſuer, in right of "her mother, has no claim to any ſhare of the moveable eſtate belonging to "her father at the time of her mother's death; and therefore repel the ſaid "claim."

Againſt this judgement a reclaiming petition was preſented for Mrs Laſhley, which was refuſed without anſwers, on the 7th July.

For the Purſuer, Mr Solicitor, John Clerk, &c. } Adv. Ja. Gibſon, W. S. }
Defender, D. of Faculty, Mat. Roſs, &c. } Adv. Lauch. Duff, W. S. } Agents.

Lord Dreghorn Ordinary. Sinclair Clerk.

June 19. 1795. Judges Preſent,

Lord PRESIDENT,

Lord JUSTICE-CLERK,	Lord DREGHORN,	Lord DUNSINNAN,
ESKGROVE,	POLKEMMET,	CRAIG,
SWINTON,	STONEFIELD,	METHVEN.

N° LXXIV. CHARLES ADDISON and SONS, Merchants, Chargers,

AGAINST

GEORGE ROBERTSON, Merchant, Greenock, &c. Suſpenders.

THIS is the caſe of an alledged concealment in an order of inſurance. The ſhip Leviathan, belonging to Meſſ. Addiſon and Sons, ſailed from Borrowſtounneſs, on the 21ſt February 1791, upon a fiſhing voyage to Greenland: five days afterwards, ſhe was put into Stromneſs bay, by ſtreſs of weather, and detained there by contrary winds till the 16th March. During the time that the ſhip was lying wind bound, the owners received two letters from the captain. The firſt was dated 11th March 1791, and ſays, "I am ſorry to inform "you,

" you, that we have been lying here ever ſince the 26th February, without " any proſpect of a fair wind. The Montroſe ſhips went out, and after eight " days cruize, came back, wind blowing very hard; and there is nineteen " ſail of ſhips, all waiting a fair wind to get to ſea. I long to be in the weſtern " ocean very much, for the time begins to expend very faſt. I hope, by the " time this reaches, we ſhall have a fair wind." The other was dated the 16th March, and informs the owners, that the ſhip was under way, with the proſpect of a fair wind, the firſt ſince it had been there.

Charles Addiſon, one of the owners, was in Glaſgow in the month of May; and in conſequence of a converſation with Mr Brown inſurance broker, in which Mr Addiſon informed him of the detention of the veſſel, it was agreed, that he ſhould endeavour to procure inſurance, that the ſhip ſhould return with a certain number of butts of blubber. The note given to the inſurance-broker was in theſe terms: " 25th May 1791. Mr James Brown, Sir, Pleaſe to in- " ſure in our favour, that the ſhip Leviathan, James Pottinger maſter, now on " a voyage from Borrowſtounneſs to Davis's Straits, or the Greenland ſeas, " ſhall return to Borrowſtounneſs with ninety tons of blubber; and to pay for " whatever proportion leſs than ninety ſhe may return with, ſaid blubber being " valued at L. 7 Sterling per butt of 126 gallons, premium fifteen guineas " per cent."

The ſuſpenders ſigned a policy in terms of the order, to the amount of L. 400 Sterling; and the Leviathan returned, having left the fiſhing ground on the 1ſt Auguſt, and with only three or four butts of blubber: a demand was made for the ſums annexed to their reſpective ſubſcriptions.

The ſuſpenders called for production of the correſpondence with the maſter; inſiſted that the detention of the ſhip was a concealment, which altered the riſk, and vacated the policy; while the chargers maintained, that the circumſtance was ſtated in the public liſt of ſhipping, was known to the broker, and was in reality immaterial, as the order would have been effectual, had the ſhip ſailed on her voyage from Borrowſtounneſs only the day before; and, in point of fact, ſhe was at the time of underwriting the policy on the fiſhing ground, and had been there for a month, although ſhe is only ſaid, in the policy, to have been on her voyage to it: Beſides, the act of parliament which gives a bounty to the ſhips engaged in this trade, requires them to have ſailed on the 10th April, at which time the Leviathan was in the fiſhing latitudes.

Beſides this queſtion, a doubt had ariſen, Whether an inſurance of this kind, eſpecially where there is a bounty from Government, on a fiſhing voyage, could be ſuſtained as legal? And upon this point a caſe was prepared, to which the following anſwer was given by Edward Bearcroft.

Query 1ſt, Whether any caſe preciſely of the ſame kind has occurred in the Courts of England, and what judgement has been pronounced on it? *Anſwer*, I do not know or believe any caſe preciſely like the preſent, or ſo near in principle as abſolutely to govern it, has ever come in litigation before a Court in England; I ſpeak of an inſurance at once objected to, on the ground of its being a mere wager, and ſo prohibited by ſtatute; and alſo, becauſe, under all its circumſtances, it is ſo manifeſtly againſt public policy, that it is therefore illegal.

Query

Query 2d, What would probably be the deciſion in the Courts of Weſtminſter-Hall upon this caſe? *Anſwer*, I am ſtrongly of opinion, that a deciſion in the Courts of Weſtminſter-Hall, on this caſe, would be in favour of the aſſured.

Query 3d, Whether, in your opinion, the inſurance in queſtion is liable to a good objection, either upon the ſtatute or at common law? *Anſwer*, It is perfectly clear to me, that this is not a wager policy, within the meaning of the ſtatute, but an aſſurance of profit on a fiſhing adventure; in order to take the chance of which the inſured has been neceſſarily put to great expences, in the outfit of the veſſel, purchaſing proper tackle for whale fiſhing, manning, &c. As for the argument on the ground of public policy, I confeſs I do not feel it; to entitle the adventurer to the bounty, he muſt comply with the requiſites of the ſtatute giving it, as to fitting out, manning the veſſel, &c. and notwithſtanding any ſuch inſurance, as is at all likely to be entered into, it will always be the intereſt of the aſſured to get as many fiſh as he can: the underwriters know the bounties given by law; and it cannot be probable that they will underwrite a policy which will tempt the inſured to neglect the adventure, in order to come upon them: and of this, they have as good means to judge, as the inſured themſelves. Upon the whole, I am of opinion, that this contract of inſurance is legal, and the inſured intitled to recover againſt the underwriters.

The cauſe came before the Court on informations.

The Court unanimouſly ſuſtained the policy as a legal one. On the point of the concealment the following opinions were delivered.

OPINIONS.

D.—The veſſel remained at Stromneſs till the 16th March. Was it not material for both parties to have known this? The general rule is, that the aſſurers muſt know every thing which can affect the riſk, and this does affect it: I am therefore for ſuſtaining the objection.

B.—Much has been founded on the time at which the ſhip may ſail in order to be entitled to the bounty: But that is the fartheſt day that is allowed, and if the ſhip ſhould remain in port beyond that day, ſhe could have no bounty. This man ſet out in February, and that is evidence to me, that February is the proper time for ſetting out, and that the fiſhing is carried on to the greateſt advantage, if the ſhip arrives in the uſual time from that period. Now, was it not material for the inſurers to know that the ſhip was thrown into Stromneſs by ſtreſs of weather, and that ſhe was not ſimply on her voyage; ſhe might have required repairs; but there is another thing, in theſe voyages there are no unneceſſary proviſions laid in; hence there were ſix weeks proviſions uſed before ſhe came on her ſtation; and conſequently ſhe could not remain ſo long on the fiſhing ſtation, by ſix weeks, as was intended.

A.—Attend to the facts. The ſhip was not driven in by ſtreſs of weather; ſhe went there in the common courſe of her voyage: ſhe was detained there by contrary winds; and there was no concealment. The ſhipmaſter's letter ſays, that he was then under way; and the order for inſurance ſays, ſimply, then on her voyage: had the letter ſaid, that the ſhip ſailed in February, without mentioning her being detained, then it would have been a concealment of riſk: But the order ſays ſimply, that the ſhip was then on her voyage,

age; and the insurers must have believed, judging from that, that she had sailed only the other day.

State of the vote: Sustain or Repell the reasons of suspension.—SUSTAIN, Lords Justice-Clerk, Swinton.—REPELL, Lords Polkemmet, Dreghorn, Dunsinnan, Craig, Methven.

The Lord President was for repelling.

The Court found the underwriters liable, in terms of the policy.

For the Chargers, Cha. Hay, Wm Clerk, } Advocates. Tho. Adair, W. S. Æn. Morrison, } Agents.
Suspenders, Wm Clerk, } Advocates. Æn. Morrison, } Agents.

Lord Craig Ordinary. Home Clerk.

July 7. 1795. Judges Present.

	Lord PRESIDENT,	
Lord JUSTICE-CLERK,	Lord STONEFIELD,	Lord METHVEN,
ESKGROVE,	ANKERVILLE,	GELNLEE.
DREGHORN,	DUNSINNAN,	
POLKEMMET,	CRAIG,	

N° LXXV. RICHARD BAINES, Merchant in Preston, and his Mandatory, Charger,

AGAINST

THOMAS TURNBULL, Merchant, Leith-walk, Suspender.

MR TURNBULL, the suspender, is employed by mercantile houses in England, to receive commissions from dealers in this country; to collect the money due to the English merchants, and to remit it; and for this he receives a commission of 2½ per cent. It was the suspender's custom, when on his journies round the country for the purpose of collecting money, to send home the money he collected, which was immediately put into the hands of Bertram, Gardner, and Company; on his arrival in Edinburgh, he also put into the hands of Bertram, Gardner, and Company, the bills he had collected: the suspender then remitted to the English merchants the sums he had received on their account; but, as the country payments were often made in bills, he sent his employers draughts on London for the precise amount of their money, payable as many days above par as would answer for the discount on the country acceptances which had not fallen due; which, in other words, was just the discount that must have been allowed for these bills, had they been turned into money, and a London bill taken at par for their produce. The bills taken by the suspender from Bertram, Gardner, and Company, were in his own name, and indorsed by him to his London correspondents.

This was said to be the common course of the suspender's practice; and at the time of the failure of Bertram, Gardner, and Company, there were bills to the amount of upwards of L. 8000 Sterling dishonoured in the hands of his English correspondents, not one of whom thought of claiming relief from him, the charger excepted, whose debt amounted to L. 138: 2: 10 Sterling.

This ſum of L. 138: 2: 10 Sterling aroſe from two bills tranſmitted under the following circumſtances: The firſt bill is dated 26th February 1793, payable at ſixty days date, for L. 73, 19 s. This ſum was made up of L. 47, 7 s. of caſh, received on account of the charger; and L. 26, 12 s. being a debt of Hugh Brown's, not payable for three months. The charger ſays, that the bill remitted ſhould have been at par, or at forty days date, in place of ſixty; which was twenty days intereſt in the pocket of the ſuſpender. The ſuſpender again anſwers, that twenty days intereſt of L. 73, 19 s. is only 4 s. While he accounted for Brown's debt of L. 26, 12 s. although it was not payable for three months, the intereſt of which would have amounted to 5 s. 9 d. and makes a loſs to him of 1 s 9½ d. which is equal to nine days intereſt, and reduces the bill below par, as it was equivalent to a bill at thirty-one days date, of the ſum actually due to the charger.

The other bill is for L. 64: 3: 10 Sterling, is dated the 13th March, and payable ſeventy five days after date, and was tranſmitted to the charger on the 24th March, from which time it was payable in ſixty-four days. When this remittance was made, the ſuſpender had only L. 11, 12 s. of the charger's in his hands; but he was in daily expectation of receiving more; and he ſent this bill at the earneſt requeſt of the charger, who was in need of money at the time. The ſuſpender's letter is in theſe terms: "On my return from a ſhort jour-"ney laſt night received yours, and duly note the particulars. I have received "no money on your account, except Mr Gibb's (L. 11, 12 s.); however, have "incloſed a ſmall bill I had by me, of L. 64: 3: 10. which may help you a little, "as J. Cowan, White, Herriot, &c. promiſed to pay me next week." The anſwer was, "I duly received your favour of the 24th, value L 64: 3: 10, to "your credit, and am very greatly obliged: can aſſure you it has come very "ſeaſonably."

Theſe two bills of L. 73, 19 s. and L. 64: 3: 10 Sterling, were drawn by Bertram, Gardner, and Company, on Baillie, Pocock, and Company, London; made payable to the ſuſpender, and indorſed by him to the charger; they were preſented by the charger for acceptance, and accepted by the company drawn on; but before the bills fell due, both drawers and acceptors had failed; and as the ſuſpender had indorſed the bills, the charger inſiſted for payment from him, on theſe grounds, that when the ſuſpender received money on account of the charger, he became his debtor; and muſt continue ſo until he repaid the money, either by delivering the caſh, or by good bills; or, admitting that the ſuſpender were bound to do no more than to remit the money, either in caſh or bills, payable to the charger; yet, having taken the bills to himſelf, and put his name on them as indorſer, he muſt be liable in recourſe, like any other indorſer; or laſtly, admitting that the ſuſpender would not have been liable on either of theſe grounds, had he kept the charger's money by itſelf; yet, having mixed it with his own, and uſed it as ſuch, by drawing intereſt from it, he thereby became the charger's debtor; and muſt remain ſo, until the bills remitted be duly honoured.

Theſe points came before the Court upon informations, when the Court (15th January 1795) "Suſtained the reaſons of ſuſpenſion, and ſuſpended the "letters

" letters ſimpliciter." Upon this occaſion the following opinions were delivered *.

OPINIONS.

D.—There is, in my opinion, great difficulty in this caſe, but I think the argument preponderates in favour of Turnbull. It is admitted, that he is not liable for the debts due to his employers; but it is ſaid, that, from the time the caſh comes into his hands, he is liable. In my opinion, if he acted reaſonably, and according to what he would have done in his own affairs, he cannot be liable: It differs widely from a del credere, for there he receives a premium for his riſk. As to the indorſation, the common rule is, that the indorſer muſt be liable to the indorſee; but there is an exception to this, where the indorſer has no value; he might have indorſed it or not as he pleaſed, or have mentioned, " without recourſe." My opinion upon the whole, is for ſuſtaining the reaſons of ſuſpenſion.

B.—With regard to the common idea of indorſation, there can be no doubt that Turnbull would be liable in recourſe; but in judging of this cauſe, we are not to reſt on the evidence ariſing from the document of debt alone, but upon the whole tranſaction. Turnbull is employed by the charger, (a merchant in London, who ſends goods to this country), as his factor, and he gets 2½ per cent. for his trouble in ſelling the goods. In my opinion, this is not too great an allowance for the trouble of collecting the debts, ſelling the goods, &c. This being the caſe, it cannot be ſaid that Turnbull meant to inſure the price of the goods to the charger. When a commiſſion del credere is given, then the factors are inſurers. The factor is bound to execute the commiſſion, and in conſequence thereof, he ſells the goods, and becomes bound for the money: here it is argued by the charger, that the ſuſpender having received the price of the goods, he muſt be liable for the amount; and no doubt he is ſo; but the queſtion is, How is payment to be made to the creditor? if he is at hand, the money muſt be paid to him; but where he is at a diſtance, it is a different queſtion; the factor then writes to his conſtituent, to inquire how it is to be ſent; he muſt follow the directions of his conſtituent; he is not bound to take the riſk of the remittance; he may hold the money till his conſtituent draws it. He gets bills from Bertram, Gardner, and Company, who, if they were in good repute at the time, were totally unexceptionable; and if the factor was not guilty of imprudent conduct, there is no room for loading him with the riſk. There is great ſtreſs laid upon the intereſt ſaid to be received from Bertram and Gardner by the ſuſpender; in my opinion, there is no matter whether intereſt was got or not. Turnbull is anſwerable for the money, when in his own hands, or in the hands of Bertram and Company, on his account. But whenever he gets a bill on London, the riſk then ceaſes; and ſhould the money then be loſt, through the failure of Bertram, Gardner, and Company, it makes no difference that it was in their hands firſt, provided that a bill has been obtained from them, when in good circumſtances. As to indorſation, Turnbull could not mean to ſubject himſelf by indorſation, it was only incautious; he did it merely

* For theſe opinions, I am indebted to a gentleman intereſted in a ſimilar cauſe.

merely to prevent the nature of the remittance being known; and if he is not liable independently of that, he cannot be liable on that account.

K.—It is a ſtrong thing to ſay, that a perſon who indorſes a bill is not liable in recourſe; and it is equally hard to ſay, that he muſt be liable without an onerous cauſe. The queſtion depends altogether upon conſtruction: as Turnbull had not a del credere commiſſion, nor was bound to guarantee the payments of the goods ſold, nor the remittances, (which would require a ſeparate premium), in my opinion he cannot be liable. The money being lodged in Bertram and Company's hands, has no effect upon the cauſe. If they had failed with his money in their hands, the loſs muſt have fallen on him, as if the money had been in his own hands; as to the remittance, it ſtands in a different ſituation; he remits by good bills, that is, bills drawn by perſons accounted reſponſible at the time. There can be no ground for recourſe.

A.—As to Bertram, Gardner, and Company, not being reſponſible at the time the bill was drawn, there can be no doubt, from what has ſince appeared, that they were then deep in debt; however, they were certainly reſponſible till they ſtopped payment. The term vergens ad inopiam cannot be applicable to a commercial dealer, even although he ſet out upon the credit of his friends alone, and was leſs than nothing when he commenced his buſineſs. Every perſon is reſponſible till he fails: Here there is no commiſſion for guaranteeing the debts; but the queſtion does not lie there, but upon the nature of the buſineſs. Mr Baines is a merchant in England; he writes to Turnbull to take care of his buſineſs, and he is not liable for the ſales to the purchaſers: he has a commiſſion merely for the trouble of ſelling. As to accounting, ſays Baines, "you muſt remit me bills on London." In the mean time, Turnbull gets the money, and puts it into the hands of Bertram and Company, either upon an account with them, or without one. How does he lodge it? he does not lodge it as Baine's money; if ſo, the caſe might be otherwiſe; but having other dealings with Bertram and Company, he puts the money into his own account, along with other peoples money, and mixes it with his own eſtate, and ſometimes draws money out of the account; where there is a fluctuating balance, there muſt be an intereſt account, on whatever ſide the intereſt may ſtand. He has occaſion to take out money, and remit a bill to Baines, and the remittance was made by taking bills payable to himſelf. My opinion does not reſt ſolely on the indorſation by Turnbull; for had the bills been taken payable to Baines himſelf, and ſo paſſed to him without any indorſation the argument would have been the ſame, and my opinion would have been the ſame. Indorſation in this caſe, I conſider as a circumſtance tending to ſhow what was the underſtanding of parties; and certainly a perſon could not indorſe a bill without perceiving that he might be made liable in recourſe. Had Turnbull indorſed any of the bills without recourſe, in my opinion, it would have brought about an explanation, and in all probability Baines would have refuſed to have taken bills in that way: for good bills were to be ſent, and good bills, in mercantile language, are bills which produce money; it is not enough that the drawers of them, or the houſe where they were payable, are good at the time of drawing the bills. Had Turnbull, therefore, taken this method of indorſing the bills, without recourſe, Baines would have ſaid, Bertram

tram and Company are not good, or, I know them not; go to the eſtabliſhed Banks, I won't take the bills of theſe private bankers. But without giving Baines any opportunity of coming to an explanation of this kind, Turnbull goes on taking theſe bills of Bertram and Company; I conſider the indorſation then, as a ſtrong proof of the underſtanding of the parties.

The circumſtance of Turnbull's lodging the money in a Bank fixed on by himſelf, and taking from it their drafts, which were ſent to Baines, is a circumſtance, too, of real evidence with me: while the money lay in this Bank, it is admitted, that Turnbull was liable for it in caſe of a failure; and how has it been taken out of this Bank? was it by the London bill? that bill has produced nothing, and the money ſtill lies where it did; unleſs it ſhall be ſaid, that it was taken out by that bill, which was no better than a piece of waſte paper.

With regard to the account again, there muſt have been one kept betwixt Turnbull, and Bertram and Company; and on that account, a balance one way or other muſt have ariſen, upon which balance, intereſt would be charged: my opinion, therefore, on the whole, is, that the letters ought to be found orderly proceeded.

K.—The money, it is true, is not taken out of the hands of Bertram and Company by the draught; but does not the draught create a difference? The debt is removed from the one houſe to the other, and Baines, by preſenting it for acceptance, ſhowed that he meant to run the riſk of the ſolvency of the Engliſh houſe; had he not meant to do ſo, it was his duty inſtantly to have returned the draught.

A.—It was Baines's duty certainly to negotiate the draught which had been tranſmitted to him.

N.—In my opinion, the ſuſpender muſt be liable: He lodged the money in his own name, it lay at his riſk, and was not affectable by the charger; and the taking a bill makes no difference: it is the ſuſpender who muſt be liable for the loſs which has happened.

K.—If this idea be gone into, the ſuſpender muſt be liable for every remittance, through whatever Bank the remittance may have been made; and yet $2\frac{1}{2}$ per cent, which was the whole of the ſuſpender's allowance, is no more than ſufficient for the trouble of collecting the money; he cannot, therefore, be ſuppoſed to guarantee the remittance, and the preſumption is, that he remitted the bill at the deſire of the charger; for regularly, the charger ought to have drawn on the ſuſpender, as his factor.

L.—As to indorſation, I cannot conſider the charger as an onerous indorſee; the indorſation is no more than a mere conveyance of the money, and Turnbull is no more than Baines's ſervant, in receiving and delivering the money, conſequently, if there be nothing faulty in his manner of conducting the buſineſs, he cannot be liable.

It was upon theſe opinions that the Court ſuſpended the letters ſimpliciter.

Againſt this judgement a petition was preſented by the charger, which was appointed to be anſwered; and came to be adviſed on the 7th July 1795, when there were preſent the following Judges.

Lord PRESIDENT,

Lord JUSTICE-CLERK,	Lord STONEFIELD,	Lord METHVEN,
ESKGROVE,	ANKERVILLE,	GLENLEE.
DREGHORN,	DUNSINNAN,	
POLKEMMET,	CRAIG,	

B.—When one perſon is debtor to another, he is bound to ſend money or good bills; but the nature of the obligation on Turnbull, the ſuſpender, is this: After Turnbull had gathered in the money belonging to the charger, if he had laid it in his bureau, and written to London, "Now your money "is recovered, how am I to remit it?" and he had been deſired to ſend a London bill, and ſent one habite and repute good, he would have done all that was incumbent on him; and ſhould the perſon drawn upon have turned out bankrupt, the loſs would have lain on the Engliſh merchant. A great deal has been ſaid on the circumſtance of the ſuſpender's having mixed the charger's money with his own; but he is to be anſwerable for it, put it where he pleaſes, in the ſame way as if it were lying in his deſk; for there I muſt hold it to be; conſequently, if he puts it into the hands of Bertram, Gardner, and Company, and they break, the loſs is his own, not his employers: But if he goes to that houſe and gets from them a London bill, and indorſes it to his Engliſh correſpondent, I cannot diſtinguiſh betwixt that caſe and his taking the money out of his deſk, and making the purchaſe from any other banker; — in either caſe, if a bankruptcy ſhall happen before the bill becomes due, it is a caſus fortuitus, for which the ſuſpender is not liable.

F.—The ſuſpender tranſmitted to the charger a London bill, with his name indorſed on it; which is juſt ſaying, in as many words, the acceptor has your money in his hands, I aſſign his acceptance to you; and if you do not recover from the acceptor, I ſhall be liable for the money: this is the plain conſtruction which the charger muſt have put upon the tranſmiſſion of a bill on which the ſuſpender appeared as the laſt indorſer.

D.—This caſe is not to be regulated by the common rule in bills; every caſe muſt ſtand on its own footing; and it was not underſtood, by any one concerned, that the ſuſpender was liable to make good the debt; when he indorſed the bill, he did not underſtand this, nor did the charger ſo underſtand the bill when he received it.

A.—I have formed an opinion on this caſe, upon grounds which I fear are wrong, becauſe they are againſt the judgements which are under review; but I ſhall give you my opinion in few words. Queſtions of periculum depend much on circumſtances; in ſome caſes the one party is liable, in other caſes the other party is liable, though it ariſe from the ſame agreement.

This, I admit, is not a del credere commiſſion; but it is one in which the mandatory is bound to do his duty. In fact, the ſuſpender received the money, and the riſk ariſing from the inſolvency of the debtor is out of the queſtion. The money is in the hands of the factor or mandatory. Now, one of your Lordſhips (B) thinks that they do not ſtand in the relation of debtor and creditor to each other; but to me it appears that they do; for having mixed the money with his own, by throwing it into a common cash-account, the ſuſpender

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is due a balance to the charger, whatever way it may ſtand; and the money put into the caſh-account is bearing intereſt, not to the charger, but to the ſuſpender. Now let us ſee how the tranſaction goes on: After the money has lain in the hands of the ſuſpender's banker, he has to remit, or, as I ſhould expreſs it, he has to account to his conſtituent, and to pay him the balance, or to ſend him good bills; now he goes to Bertram and Gardner, and tells them he has to pay L. 200 to the charger, and that he wants a draught on London. Certainly (ſay Bertram and Gardner) you ſhall be accommodated; Baillie, Pocock, and Company. are a branch of our houſe, we ſhall give you a draught on them, ſend it to your correſpondent, and it will be paid. If the bill ſent in this manner be paid, there is an end of the tranſaction: But if in the mean time this concern fail, the draught returns upon the ſuſpender a uſeleſs piece of paper.

Baine, the charger, has not received payment of his debt due by the ſuſpender. Now, has this piece of paper taken the money out of the caſh account? No; there the ſuſpender's money remains; it lies there as it did before the draught was made; and it appears to me, that the periculum remains juſt where it was at firſt. The bill, which has been ſent to London, is juſt an order on the ſuſpender's caſh account, which has not been anſwered; and would a draught on a caſh-account be held to be a good payment to the charger, when he had not received one ſixpence in conſequence of that draught?

Here your Lordſhips will perceive, that this is a moſt important caſe; the principle of which applies to every caſe of factory, of conſignation of money, of negotiorum geſtor, of factors in the country. I ſhall ſuppoſe, that my factor puts my rents into his own caſh-account, and when I demand payment from him, he ſends me a draught by that banker on a banker here, (though even that is a more favourable caſe); but before the draught becomes due, both the bankers ſtop payment, and I receive no money for it. This is the ſame as if my factor were to pay me in counterfeit money, or as if he had changed it into bad gold. Am I forced to take theſe, or to bear they loſs in any one of theſe caſes? I apprehend not; the periculum lies with the factor, though, in other circumſtances, the periculum might lie with me. But I ſpeak at preſent of this caſe only, and I am clear that the ſuſpender has not diſcharged his debt to the charger.

C.—I ſubſcribe to the doctrine, that the onerous indorſee of a bill muſt be liable; and that a payment by a factor, through the medium of a bad bill, is not effectual, when the money ought to have been delivered from his hand into the hand of his conſtituent. But every cauſe depends on its own circumſtances. Here a traveller or rider is allowed a reward for his trouble in collecting the debts of the merchant; he does not anſwer for the payment of thoſe to whom he ſells: when he receives the money, he has to ſend it to his employer, and he remains his creditor until it is ſent. What were the directions that he received on this point? that he was to ſend good London bills; and when he has done ſo, the periculum goes from him to his employer. Now, does he take the bills in queſtion on his own riſk, or on that of his conſtituent? And here I can lay no

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ſtreſs on the circumſtance which has been taken notice of, that Baillie, Pocock and Company were the ſame company with Bertram and Gardner. He did not know that they were mere men of ſtraw. I wiſh we could put an end to ſuch devices; but that circumſtance does not enter into this queſtion, becauſe it was not known that they were the ſame Company; and the caſe is to be conſidered, as if Bertram and Company had drawn on any other houſe in London. The only queſtion therefore is, Whether was this a payment in terms of the orders received by the ſuſpender from his employer? As it appears to me that he did follow his directions in ſending a bill which was underſtood to be good, and which was retained by the employer after it came to hand, and until it was diſhonoured, I hold it to be a good payment.

A.—I did not draw any argument from the indorſation, becauſe I took a more enlarged view of the caſe; and yet both this circumſtance and the others appearing from the correſpondence of the parties, enter into my mind in judging of this caſe. The charger by good bills, underſtood bills that would produce money, that is what merchants call a good bill.

N.—Conſidering the whole circumſtances of the caſe, and the correſpondence betwixt the parties, I am for throwing the loſs on the ſuſpender.

Upon adviſing the cauſe, the Court altered the former judgement, and found the letters orderly proceeded The queſtion was now brought under review by Mr Turnbull; the ſuſpender, and the petition being appointed to be anſwered, the petition and anſwers were taken up by the Court on the 1ſt December 1795, when the following Judges were preſent.

Lord PRESIDENT,

Lord JUSTICE-CLERK,	Lord POLKEMMET,	Lord DUNSINNAN,
ESKGROVE,	MONBODDO,	CRAIG,
SWINTON,	STONEFIELD,	METHVEN,
DREGHORN,	ANKERVILLE,	GLENLEE.

A.—His Lordſhip explained what he underſtood to have been the tranſaction betwixt Turnbull, and Bertram, Gardner, and Company, in conſequence of his having gone over the books alongſt with the truſtee, but without any of the parties being preſent. The tranſactions appeared to his Lordſhip to have conſiſted principally in paying in country bills, and receiving in return London bills; and generally theſe tranſactions balanced each other. At other times, when Turnbull was in the country, he went to a branch of one of the Edinburgh Banks, and exchanged his country bills for Edinburgh bills, which he immediately tranſmitted to Bertram, Gardner, and Company In Februrry 1793, Mr Turnbull had ſent a large remittance to Bertram Gardner, and Company; and when he came to Town, he had occaſion to remit L. 4000 to London. At this time, he had L. 2000 in the hands of Bertram, Gardner, and Company, and he gave them L. 2000 more, taking bills on London for L. 4000 Sterling, of which the L. 71 bill, one of the bills in queſtion, made a part.

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The fact, with regard to intereſt, as it was explained to me by the truſtee, was this: when Mr Turnbull had money for weeks in the hands of the company, the company allowed him intereſt on it, either by giving direct intereſt, or by diſcount; ſo that in one way or another, an allowance was made to Mr Turnbull for the intereſt during the time that the money was in the hands of the company.

His Lordſhip ſaid, that he found it difficult to follow the explanation of the tranſaction; and when he enquired whether there was not intereſt charged at the cloſe of the account, he was told, that at the time of the failure there was no balance due; but the perſon who was employed in balancing the books, calculated intereſt on all the accounts.

OPINIONS.

D.—It does not appear to me, that theſe circumſtances at all affect this cauſe, which turns on this ſhort iſſue, Was Turnbull bound to ſend money to London at his own riſk? If he was not bound, am I to ſuppoſe that he intentionally put his head into this nooſe. It is true he indorſed the bills; but why is an indorſer bound? becauſe he receives value; but here the indorſer received no value.

Had Turnbull indorſed a bill received on Baines's account, and ſent the amount to Baines, and had the acceptor in the bill failed, the holder might have come upon Mr Turnbull, but Turnbull would have had his relief from Baines: Even had Turnbull lent out the money, the moment it was taken up and put in tranſitu, the riſk lay on Baines.

B.—The deciſion of this queſtion depends on this plain and ſimple view. When a London merchant employs a perſon here to uplift debts in this country, or when a gentleman employs a factor at 2½ per cent. we cannot make that perſon liable for the riſk of remitting the money, unleſs ſuch riſk has been expreſsly ſtipulated. Now, What was the obligation on the factor in the caſe before us? That he was to receive money on account of the charger. He receives L. 700 on his account, I ſhall ſuppoſe, and he aſks, what am I to do with this money? the anſwer would be, ſend me good bills: and if, at any one time, that inſtruction had been given, there was no occaſion for renewing it; it would continue in force until contrary directions were given.

Such being the nature of the obligation on the ſuſpender, it occurs to me to be of no conſequence where he put the money, or whether he drew intereſt for it during the time that it remained with him. He poſſeſſes the ipſa corpora; in the eye of law, it is in his hands; wherever it may be actually placed, it will be held to be in his eſcrutoire, and if it ſhould be loſt, the loſs muſt fall on the factor. But the ſuſpender comes to ſend the money to the charger, and he takes a bill from Bertram, Gardner, and Company. This is taken from the money which the ſuſpender had put into their hands; and it is the ſame thing, as if he had had no money in their hands, and had paid for the bills. The only objection then is, that the ſuſpender has ſent bad bills; but if Bertram, Gardner, and Company, were in good credit at the time, this is no objection; and that ariſing from the effect of the indorſation has been very well explained by the Judge who ſpoke laſt. In my opinion, therefore, no action can lie.

E.—I am for altering. I obſerve, in regard to one of the bills, that it would be a very hard caſe, indeed, were we to decide againſt the ſuſpender, for he had not a fraction of Baines's in his hands at the time that he made the remittance. It was made merely to accommodate Baines; if therefore the preſent judgement is to ſtand, an exception ſhould be made in regard to this bill. But, I confeſs, I am for making no diſtinction, I am for altering. What was this man's object? To get his goods ſold. They are ſold by the ſuſpender, and the price remitted according to the common practice of merchants. Had I ſeen any thing in the tranſaction out of the common way, I might have been induced to decide againſt him; but, on the whole, I am very clearly for ſuſpending the letters.

N.—1. I lay much ſtreſs on the correſpondence; and on peruſing the letters, it appeared to me that the ſuſpender ſtood guarantee. 2. The bills are made payable, not to the charger, but to the ſuſpender. 3. The proceeds of the goods were lodged on the ſuſpender's account with Bertram, Gardner, and Company, without any diſtinction being made betwixt that money and his own funds. Had the money remained in the ſuſpender's name, he muſt have been liable; and I think what has happened is extremely ſimilar; at the ſame time, I think there is a great deal in the argument which has been uſed by the Judges who have delivered their opinions.

A.—I am not clear that any profit was made by the ſuſpender on the money belonging to the charger; but in the general queſtion, I muſt own, it appears to me a nice matter, to free a man from the debt whoſe name appears on the bill as an indorſer; it is a thing not to be eaſily done. It has been ſaid, that there is this diſtinction betwixt this indorſer and any other, that he received no value; but had he not Baines's money in his pocket? and if ſo, had he not received value?

The moment that the ſuſpender received money on account of Baines, he became debtor to Baines. I ſhall not uſe this word in the ſame ſenſe as if he had granted a bond to Baines, but he was accountable. He might have ſaid to Baines, I will not remit the money; it is lying ready for you; draw on me for it. Or he might have ſaid another thing,—You deſire me to remit the money to you by bills on London: the houſe I deal with here is Bertram, Gardner, and Company; and I ſhall ſend you their bills on their London correſpondent: and had he ſaid ſo, and had Baines agreed to receive them, there was an end to the queſtion. But is it not probable, that Baines would rather have ſaid, I never heard of Bertram, Gardner, and Company; I know nothing of their ſituation; if you ſend their bills, you muſt yourſelf take the riſk; but take bank-bills from the national banks; make your remittances through them, and I have no objection to run the riſk.

But I put the cauſe on this, that Turnbull was bound to ſend good bills to London. Now good bills are bills that actually produce money. Every man who has not actually ſtopt payment, is to be held good; and therefore, had Mr Turnbull gone to the moſt obſcure banker in Scotland, he would have had the ſame argument in law which he has here.

It has been ſaid, what if Mr Turnbull had remitted bills by the purchaſer from Baines?—Had he done ſo without putting his name on the bill, he could not have been liable. But if, in place of this, he put his name on the bill, I apprehend that he guaranteed the ſolvency of the acceptor, although without this he would have lain under no ſuch obligation. I would, when he put his name on the bill, underſtand him to have a friendſhip for the acceptor of the bill, and that he meant to guarantee it: my argument goes that length. It is in that light in which the caſe appears to me.

C.—I was againſt this interlocutor when it was pronounced; and although I came into Court with a different opinion, yet I was greatly affected by the arguments againſt the judgement, and particularly by thoſe of one Judge who ſpoke early (B.). It was ſaid, that 2½ per cent. (the allowance to the ſuſpender) is not equal to the diſcount on London; and that it is not to be preſumed, that on that allowance the ſuſpender was to run any riſks; but what has been ſtated by the two Judges who ſpoke laſt, has brought me back to the opinion which I entertained when I entered the Court.

If, by the terms of his agreement, Turnbull was to carry on the trade in a diſadvantageous manner, he muſt ſtand to the conſequences; he has been imprudent, and he ought not to have made the bargain.

My opinion was altered firſt on the correſpondence. When the bill had been diſhonoured, he took it back: why did he not ſay, on the failure of Bertram, Gardner, and Company, the bill was on your riſk? This was not done; and therefore I think he had an idea that he was bound.

I alſo think it ſomething, though I do not lay much ſtreſs on it, that he did not obtain bills payable to Baines. In place of this, however, he brought every thing into a common ſtock; he put it into the hands of Bertram, Gardner, and Company, it was lodged there on his own account; and in place of taking a bill payable to Baines, he takes the bill to himſelf, and indorſes it to Baines; ſo that when I come to join this to the other circumſtances, I cannot believe but that the ſuſpender underſtood himſelf to be liable to warrant the remittance.

This man is a merchant; why did he not, when he indorſed, add the words, without recourſe? It is on theſe grounds that I have altered my opinion, and that I am now for the interlocutor.

A.—From the correſpondence, the ſuſpender certainly did underſtand that he was liable; and the way in which he came to alter his opinion, was upon the nature of the obligation del credere; but this is not a caſe to which that is applicable.

State of the vote: Adhere or Alter.—ADHERE, Lords Eſkgrove, Polkemmet, Stonefield, Ankerville, Dunſinnan, Craig, Glenlee.—ALTER, Lords Juſtice Clerk, Swinton, Dreghorn, Monboddo, Methven.

The Lord Preſident was for adhering.*

For the Charger, George Fergusſon, Suſpender. Dean of Faculty, and W. Max. Moriſon, Adv. — Alex. Young, W. S. D. Thomſon, W. S. Agents.

Lord Dunſinnan, Ordinary. — Menzies, Clerk.

8th

* It may be agreeable to thoſe concerned in tranſactions of this nature with Engliſhmen, to

8th July 1795. Judges Preſent.

Lord PRESIDENT,

Lord JUSTICE-CLERK,	Lord STONEFIELD,	Lord METHVEN,
ESKGROVE,	ANKERVILLE,	GLENLEE,
DREGHORN,	DUNSINNAN,	
POLKEMMET,	CRAIG,	

N° LXXVI. WILLIAM KEITH, Eſq; Accountant, Truſtee for the Creditors of JOHN SYM Writer to the Signet, Purſuer,

AGAINST

JOHN MAXWELL, Eſq; of Terraughty, Defender.

THIS is a queſtion upon the effect of an abſolute diſpoſition, with a backbond, given in ſecurity of a caſh-account. The late John Sym was indebted to Mr Maxwell Conſtable in L. 6000 Sterling; and it was agreed, that a bond ſhould be granted for this ſum in favour of Mr Maxwell of Terraughty, the defender. On the 3d December 1779, a perſonal bond for that ſum was granted; and Mr Sym, at the ſame time, gave an abſolute diſpoſition of his eſtate to the defender, from whom he received a backbond, of date the 6th of the month, narrating the tranſaction, acknowledging that it had been granted in ſecurity of the debt of L. 6000, and obliging himſelf, his heirs, and ſucceſſors, to reconvey the ſaid lands to Mr Sym, on being repaid the ſaid debt. The infeftment on the abſolute diſpoſition was taken in the 1781. Immediately on this infeftment's being put on record, Mr Sym's affairs went into diſorder; and a reduction of this ſecurity was brought by the Ayr Bank, in which proceſs the backbond was produced, and the whole nature of the original tranſaction for behoof of Mr Maxwell Conſtable laid open.

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to ſee an Engliſh mercantile opinion on this caſe; and I give it the more readily, that it alſo explains their opinion on the obligation *del credere*.

OPINION.

" We conſider the commiſſion of *del credere* to extend no further, and to have no other " effect, than to guarantee the payment by a purchaſer to the factor, for goods ſold by him " on account of a principal. When the factor has once received the money, it becomes im- " material whether he originally ſtood *del credere*, or not. The ſituation of the parties is chan- " ged, and the factor becomes himſelf the debtor to the principal, as for money received for " his uſe, without reference whether or not the factor was to have guaranteed the ſolvency " of the purchaſer, and juſt as if each had been originally principal with the other. Being " ſo indebted, it is impoſſible to ſay that a diſhonoured bill is payment: the factor is *prima* " *facie* liable as indorſer of the bills, which in our conception are not gratuitous indorſements, " but for good conſideration; and even had he not indorſed the bills, ſtill he would, on " their being returned diſhonoured, have been liable on the original conſideration, as for " money received for the uſe of the principal. If a contrary doctrine was eſtabliſhed, it " would open a door to every ſpecies of fraud: If a bill of one perſon or houſe is payment " to a principal, every bill whatſoever muſt be, unleſs you can impute wilful fraud, which " can ſeldom be made out, much leſs by a man in one country againſt one in another.

" If any ſpecies of remittance had been ordered by the principal, that would take the " caſe out of the general opinion we give."

In the 1788, Mr Sym procured a caſh-account from Sir William Forbes and Company, in which caſh-account the defender became cautioner, by bond of date the 31ſt December 1788. Of the ſame date, Mr Sym granted a bond of relief and declaration to the defender, narrating the backbond formerly granted, and the bond to Sir William Forbes; and upon this narrative, Mr Sym becomes bound to relieve the defender of the bond for the caſh-account; and declares, that the diſpoſition and infeftment in the defender's favour do ſtill ſubſiſt in his perſon, as a ſecurity for Mr Maxwell Conſtable's debt, and alſo for the bond of credit: and the deed declares, that the defender "ſhall not be obliged to denude of the lands conveyed as aforeſaid, "till ſuch time as the ſums, principal and intereſt, ſecured as aforeſaid, ſhall "be fully ſatisfied and paid, and the defender completely relieved of what he "may be obliged to pay on account of his joining in the ſaid bond of credit; "and I do, to the extent foreſaid, diſcharge the backbond before narrated, "and oblige me to warrant at all hands," &c.

In November 1790, the caſh-account in favour of Mr Sym being exhauſted, was paid up by the defender, who claimed retention of his heritable right, until relieved both of Mr Maxwell Conſtable's debt, and the caſh credit. On the other hand, the truſtee for the creditors (Mr Sym being now dead) brought a reduction of the right, founding on the acts 1621 and 1696.

When the cauſe was firſt ſtated, the Lord Juſtice-Clerk Ordinary "reduced, decerned, and declared, in terms of the libel, in ſo far as reſpects the "ſecurity libelled on, in favour of the defender in his own right." But afterwards, on adviſing a repreſentation, &c. his Lordſhip, "in reſpect "that the bond of relief 1788, diſcharging pro tanto the former backbond, "was granted unico contextu with the bond of credit for L. 500 to Sir William Forbes and Company, finds, That the foreſaid debt is not ſtruck at "by the firſt clauſe of the act 1696; and in reſpect that the deed 3d December 1779 is ex facie an abſolute and irredeemable diſpoſition of the lands, "but qualified by a relative backbond, finds, That the diſpoſition and infeftment does not fall under the ſecond clauſe of the ſtatute 1696, but muſt "ſubſiſt in favour of the defender, till he is relieved of his engagement for "Mr Sym, whether prior or poſterior to the date of the infeftment; and "therefore, on the whole, alters the former interlocutor, and aſſoilzies the "defender from this reduction." This judgement was brought under review of the Court; and, upon the petition and anſwers being adviſed, memorials were ordered by the Court, which came to be adviſed on the 12th December 1794, when the following Judges were preſent.

Lord PRESIDENT,

Lord JUSTICE-CLERK,	Lord POLKEMMET,	Lord ABERCROMBY,
ESKGROVE.	STONEFIELD,	CRAIG.
SWINTON,	HENDERLAND,	
DREGHORN,	DUNSINNAN,	

C.—This backbond was the eſtate of Sym; it was the eſtate minus the debt to Maxwell Conſtable; therefore, when Sym did any thing in favour of the former, or of a new creditor, he was giving a ſecurity contrary to the act

of parliament, although it was conſtituted by aſſignation; for this is a mode by which a preference may be given.

A.—The objection to the right is not founded on the firſt, but on the ſecond clauſe of the act, and the whole turns on the words of the act. The ſecond clauſe declares, "That any diſpoſition, or other rights that ſhall be granted "for hereafter, for relief or ſecurity of debts to be contracted for the future, "ſhall be of no force as to any ſuch debts that ſhall be found to be contracted "after the ſeiſin or infeftment following on the ſaid diſpoſition or right." Now Mr Roſs's argument is, that there was a right granted, at the date of this new ſecurity, of the nature of an infeftment; it had the effect of making an old infeftment revive; but there was no new infeftment, ſo that the right does not fall under the words of the act, and if there be any argument in the caſe, that is it. The original diſpoſition was ex facie abſolute and irredeemable; but at the ſame time qualified with a backbond, declaring, that the right was no more than a ſecurity for L. 6000: Now, I ſhall ſuppoſe that the backbond had been put into the regiſter of ſeiſins, to qualify the right; one thing you will conſider, and that is, What effect is to be given to this? Has it the effect of creating the whole a ſecurity to the extent of the L. 6000 only? But there was a queſtion in this Court, in which the whole deeds, and this backbond amongſt the reſt, were produced, by which the nature of the whole tranſaction was made public to all mankind, and it was ſhown to be no more than a ſecurity of the L. 6000 debt. But you will alſo attend to this, that the preſent is not a ſecurity to Mr Maxwell Conſtable; it is, in fact, letting in a third party to a benefit under this heritable ſecurity, which is ſaid to be the ſame as if it were in favour of Maxwell Conſtable himſelf, as the perſon favoured is his truſtee, who ſtands heritably veſted in the lands.

B.—It has been determined again and again, and the point is now underſtood to be at reſt, that, where there is a diſpoſition appearing ex facie abſolute, the diſponee is held to be proprietor, and is not ſtruck at by the act 1696. This is a diſpoſition to the truſtee abſolute; and, although the right be qualified with a backbond, which taken altogether ſhows that it is no more than a mere truſt; yet it is on ſuch rights that truſtees advance money, and are ſecured in their preferences. It is a miſtake to ſuppoſe, that this right is to Mr Maxwell Conſtable; it is a right to Maxwell of Terraughty, the defender in this cauſe; and although it is qualified by the backbond, yet it is the defender that ſtands in the record abſolute proprietor. Now, was there any thing to have prevented Maxwell Conſtable to have enlarged the eſtate, by making a greater advance to Mr Sym? There was nothing to have prevented it; then, why may not the defender have enlarged it? There was nothing awanting but the conſent of the reverſer, and the act 1696 does not apply to ſuch a ſecurity.

C.—I am not yet ſo far ſatisfied of this, as to alter my opinion in favour of the right, whether it be granted to the one Maxwell or the other. I ſhall ſuppoſe, that the truſtee obtains a right; and that he ſhould find, that there was not only ſufficient to diſcharge the debt, but a ſurplus over; could the truſtee, before denuding, give a right to the ſecurity?

B.—He could; it would be a novum debitum.

C.—

C.—It appears to me, that he could not; becauſe it would be a ſecurity for a debt to be contracted.

A.—Were this the caſe of an abſolute right, it could have given riſe to no queſtion; but here you are letting in two perſons, and the ſecond comes in, in a ſituation in which you would not have admitted even Maxwell Conſtable; for, after the backbond was produced in this Court, and it was admitted, that the diſpoſition was not abſolute, but a ſecurity only to a certain extent, and known to all parties; it was the ſame as if the deed had been recorded in the regiſter of ſeiſins. But, not only was it ſo produced and qualified, in a caſe where all the parties here were parties, but you will obſerve, that the right was proved to have been in Maxwell Conſtable; and though there ſhould be ground for finding, that the debt might be enlarged in his own favour, I am at a loſs to find on what grounds we are to let in Maxwell of Terraughty, the defender, by any loan that he can make, or by purchaſing up debts. His argument is, I ſtand in the feudal right of the ſubject; and, although I have produced in the former proceſs, as a ſecurity to a certain extent, yet I now make uſe of it to cover a tranſaction which is ſtruck at by the act 1696; it is a ſecurity which falls under the ſecond clauſe of the act; and I would have been of the ſame opinion on the firſt clauſe; but whether the queſtion ariſe on the one or on the other, when all the parties know the right is a mere ſecurity, it is not poſſible to give a new ſecurity on it.

B.—Then you overturn all the old deciſions of this Court.

A.—Mr Roſs ſays, That the firſt clauſe of the act requires the bankruptcy of the granter, but that the ſecond does not; and that is a queſtion of importance. The preamble of the act refers to the caſe of a bankruptcy; now, take the caſe of Mr Sym, who was a notour bankrupt, and who gives an abſolute diſpoſition; and if that caſe does not fall under the ſecond clauſe of the act, then, no doubt, there is much in the argument uſed by Mr Roſs, and I wiſh you to conſider it.

B.—If the ſecurity be given for debts formerly contracted, it is ſtruck at by the firſt clauſe of the act; But when the ſecurity is not for prior debts, it is not ſtruck at.

Upon theſe opinions the following judgement was pronounced: "The "Lords having adviſed the mutual memorials, &c. reduce, decern, and de- "clare, in terms of the libel, in ſo far as reſpects the ſecurity therein mention- "ed, granted in favour of the ſaid John Maxwell, Eſq; defender."

Againſt this judgement a petition was preſented for the defender, which was appointed to be anſwered; and the petition and anſwers came to be adviſed of this date, the 8th July 1795, when the following opinions were delivered.

OPINIONS.

B.—I am now for adhering; at the ſame time, I am not for incroaching in the ſmalleſt degree on the principle of the deciſion in the caſe of Niblie; it would be a loſs to the country if we were. Neither am I moved by the diſtinction, that Maxwell did not ſtand infeft, for the purpoſe of ſecuring himſelf: the full feudal right was in him, and it was in the power of the reverſer to have

qualified

qualified the backbond; it is like an eik to a reverſion: But what I go on is this, a reduction was brought of the ſecurity for the L. 6000 bond, and in that action it was eſtabliſhed, that the nominal diſponee had not a right of property in him; and that he was only infeft as truſtee for Mr Maxwell Conſtable, to the extent of ſecuring the debt of L. 6000; and therefore, I apprehend, that it cannot afterwards be conſidered as an abſolute right of property, becauſe the contrary ſtands proved in the records of Court. I therefore conſider the defender as ſtanding infeft from the firſt, not abſolutely, but in ſecurity of the L. 6000 Sterling, in which caſe, the ſecurity could not be extended ſo as to cover the new tranſaction.

C.—I am for adhering.

A.—My opinion reſts on the grounds which have been ſtated (B.) that the nature of the right was explained to all concerned, by the proceedings in this Court; and it is by no means the ſame with the caſe of Niblie, where the right of the truſtee was abſolute, and he was called to denude; there the truſtee very properly ſaid, that on the faith of the abſolute right, he had contracted debt, and was intitled to be relieved of that debt. The principle was rightly applied in the caſe of Niblie, and where it is ſo, the principle is a good one, though it is very apt to be miſapplied, and here I think it would be ſo.

The Court adhered.

For the Purſuer, Geo. Ferguſſon, M. Roſs, } Adv. H. Corrie, W.S. Jo. Tait, jun. W. S. } Agents.
Defender,

Lord Juſtice-Clerk, Ordinary. Pringle, Clerk.

THE END.